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CURRENT EVENTS.

CORPORAL PUNISHMENT—FLOGGING—WIFE-BEATING.—We learn from the newspapers that the American Bar Association, at its recent meeting, discussed, without reaching any conclusion, the question whether it was desirable, in the punishment of certain atrocious offenses, especially wife-beating, to go back to first principles and restore the ancient practice of public flogging by judicial sentence.

We have not yet had the advantage of reading what was said in the discussion and can just now only express, with much diffidence, our first impressions of the subject, which presents more points of difficulty than would appear upon a superficial view.

That offenders of this class, expecially wretches who beat their wives, should be punished with great severity is a proposition which no one will gainsay, but it is by no means clear that it can always or generally be done without inflicting great and undeserved injury upon the innocent and unfortunate wife and children of the culprit. If you fine him and the fine should be collected, the comfort of the family is wofully diminished, unless the case is very exceptional; if you immure him in prison and his labor is essential to their support, they are reduced to want and beggary while their wrongs are being expiated; if the punishment is made short and sharp by flogging, you inflict, in the present state of public opinion, not only on him, but upon all connected with him, a disgrace which will last as long as life lasts.

As the law now stands in most of the States, there can be no doubt that wives often submit to almost intolerable suffering and indignities rather than accuse their husbands and thereby bring upon themselves and their children want or even starvation. And would not the wife's reluctance to disclose her wrongs be even greater if the whipping post were restored and the consequence of her accusation should be not only that her husban would be a marked man but she would be a marked women to her life's end? The fact is that, under the law as it stands and under the suggested substitute, it is almost or quite impossible to inflict adequate punishment upon men guilty of this atrocious crime without inflicting equal or greater punishment upon innocent persons who deserve the pity and sympathy of the community.

If the substitute proposed were not in public opinion infamous, the subject would be freed of much of its difficulty. But it *is* infamous and the infamy is indelible. Even in England, when "whipping at the cart's tail" was common, and it was a fashionable amusement of ladies and gentlemen to witness the performance, "the hangman's lash" was the synonym of degradation. We do not think it a bit too severe for the man who is guilty of beating his wife, but the fact that this great degradation must be shared by her and her children "must give us pause." But for that fact we should advocate the suggested change and favor the infliction of severe corporal punishment upon offenders of this description.

THE EDMUNDS LAW—POLYGAMY.—Justices of the peace are coming to the front. Our readers will no doubt remember the case in which a Kentucky justice took it upon himself to release upon *habeas corpus* a prisoner (Cornelison) held for punishment under the sentence of the Kentucky Court of Appeals, the court of last resort in that State. And now a justice of Washington City, sitting as police magistrate, holds responsible for polygamy, or its equivalent, under the well known "Edmunds" act, a Dr. Crawford, of the United States Navy. And as far as we are at present advised it is by no means clear that the justice is at all at fault in his view of the law.

It seems that Dr. Crawford "loved not wisely but too well;" that he had two or more *de facto* wives in the city of Washington, a place subject to the exclusive jurisdiction of the United States government, and the justice very naturally concluded, after hearing the argument of counsel, that all acts

of congress relating to places under federal jurisdiction were in force in Washington, as far as they were applicable to the state of affairs existing in that city. The real legal question is whether the Edmunds act is so applicable, and this question will in due time be decided by a higher court, if not by the highest court in the land. Crawford was convicted, sentenced to six months' imprisonment and appealed of course.

The Edmunds act was framed to cover the state of affairs notoriously existing in one of the Territories of the United States, and to a less extent in others, but, from the generality of its terms, it may be presumed, includes the District of Columbia, as well as all other places within the federal jurisdiction. We cannot see why, in framing a statute which is not local in its subject-matter, any legislative body should limit its application to any particular portion of its territorial jurisdiction. It is as possible for a man to marry two wives in Washington City as in Salt Lake City, and to contract such unions upon libidinous as upon religious principles, and we cannot see any reason why a statute designed to suppress polygamy should not apply to every place within the jurisdiction of the legislative body which enacts the law, unless it is expressly limited in its operation to specified localities, or to polygamous marriages contracted upon, so called, religious pretexts.

If the views of the trial court shall be sustained upon appeal, it may well come to pass that a measure designed to suppress immoral practices among the saints of Utah may become a scourge for the sinners of Washington. We shall look forward with much interest to the decision of this question.

NOTES OF RECENT DECISIONS.

BANKING—DEBTOR AND CREDITOR—INSTRUMENTS FOR COLLECTION.—The New Jersey Court of Chancery recently decided a case[1] in which are defined the relations between a bank sending to another bank commercial paper for collection and the bank to which such paper is sent. The facts in the case are simple: In May, 1884, a Philadelphia bank sent for collection, with the customary indorsement, to the Gloucester City Savings Institution certain promissory notes; the notes were duly collected and placed to the credit of the Philadelphia bank; very soon thereafter, July 2, 1884, the Gloucester City Savings Institution failed and its property all passed into the hands of a receiver. The Philadelphia bank claimed that it was entitled to payment in full by the receiver of all the money collected by the savings institution, and he contended that the Philadelphia bank had become one of the creditors of the institution to the amount of its collections on the account of the bank. He filed a petition asking for instructions as to what he should do about the matter. After hearing argument on both sides the court held that the receiver was bound to pay the Philadelphia bank in full, saying:

"It is said that, when these notes were paid, it was impossible for the savings institution to keep the money separate from the other funds of the bank, and that when they were mingled with the other funds and the Independence Bank had credit therefor, the simple relation of debtor and creditor arose, and that if the relation of principal and agent ever did exist it did so no longer after such entry on the books of the bank. I can see nothing in the argument respecting the impossibility of keeping the money separate when collected. The collecting bank could place such money in an envelope or other paper, and preserve its identity just as easily and as certainly as it could the note or draft collected. Nor can I see any force in the insistment that the entry by the collecting bank upon its books of the sum or sums of money collected changed the rights or relations of the parties. It would hardly be safe to say that an agent could make himself a debtor, simply, as distinguished from agent, by a confusion of the moneys or goods of his principal, and by then giving his principal credit for their value or the amount collected. Any such doctrine would be dangerous in the extreme, and would inevitably compel the abandonment of commercial transactions by means of agents.

[1] Thompson v. Gloucester City Savings Institution, March 5, 1887; The Reporter, vol. 24, p. 182.

But no difficulty whateves arises from the confusion of these moneys, any more than in every other case where the rightful owner is in pursuit of trust funds. In such case the owner need not point out the very goods, or bills, or coin. He does all the law requires if he shows that the goods, or bills, or coin came to the hands of the defendant impressed with a trust to his knowledge. In every such case the holder must respond either in the article taken or its value. And these thoughts are sustained by the court of errors and appeals in Hoffman v. First National Bank of Jersey City, 17 Vroom, 604; Sweeney v. Easter, 1 Wall. 166; Hook v. Pratt, 78 N. Y. 371; 2 Parsons on Bills, 21, 22, 28; McLeod v. Evans, 28 N. W. Rep. 173; Hackett v. Reynolds, 6 Atl. Rep. 689; Morse on Banking, 420. That banks may collect notes or drafts for each other, and in so doing establish a system of mutual dealing, and thereby stand in the relation of debtor and creditor, as a banker does with his ordinary depositor, is not questioned, nor are the foregoing views at all inconsistent therewith.

"I will advise an order that the receiver pay to the Independence National Bank the full amount collected on said notes and drafts, with interest. If the money collected on the note sent to the National State Bank of Canada be still in its possession, the Independence Bank can look to it for that."

THE RIGHT TO BEGIN AND REPLY.

SECTION.

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6. In Actions on Contracts which Liquidate the Damages.
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8. Doctrine of this Article Restated.

§ 1. *Importance of the Right.*—The right to open and close the argument in a civil case has been deemed of such importance that it has been the subject of a distinct treatise by a distinguished law writer and judge.[1] It is the settled law in England,[2] and in most,[3] though not all,[4] American jurisdictions, that a deprivation of this right is substantial error, which, if saved and properly presented by a bill of exceptions, will operate to reverse a judgment; while in still others there is a middle rule to the effect that it is a matter within the sound discretion of the trial court, which discretion will not be revised except in cases of manifest abuse.[5]

[1] Best on the Right to Begin and Reply.

[2] Huckman v. Firnie, 3 Mees. & W. 505; Mercer v. Whall, 5 Ad. & El. (N. S.) 447; Geach v. Ingall, 14 Mees. & W. 95; Ashby v. Bates, 15 Mees. & W. 589.

[3] Davis v. Mason, 4 Pick. 156; Robinson v. Hitchcock, 8 Met. (Mass.) 64; Merriam v. Cunningham, 11 Cush. 40, 44; Benham v. Rowe, 2 Cal. 387, 408; Singleton v. Millett, 1 Nott & McC. (S. C.) 355; Johnson v. Wideman, Dudley (S. C.) 328; Huntington v. Conkey, 33 Barb. 218; Ayrault v. Chamberlain, 33 Barb. 229; Hill v. Perry, 82 Ind. 28; Johnson v. Josephs, 75 Me. 544; Ney v. Rothe, 61 Tex. 374; Millerd v. Thorn, 56 N. Y. 402; Claflin v. Baere, 28 Hun (N. Y.), 204; Johnson v. Maxwell, 87 N. C. 18, 22; Penhryn Slate Co. v. Meyer, 8 Daly (N. Y.), 402; s. c., 15 Abb. Pr. (N. Y.) 376; Lindsley v. European Petroleum Co., 3 Lans. (N. Y.) 176; Elwell v. Chamberlain, 31 N. Y. 614; Churchwell v. Rogerds, Hardin (Ky.), 182; Goldsberry v. Stuteville, 3 Bibb (Ky.), 335; Blackledge v. Pine, 28 Ind. 466.

[4] Montgomery v. Swindler, 32 Oh. St. 224, 226; Comstock v. Hadlyme Ecc. Soc., 8 Conn. 254; Scott v. Hull, 8 Conn. 296; Lexington, etc. Ins. Co. v. Paver, 16 Oh. St. 324, 330; State v. Watham, 48 Mo. 55; Wade v. Scott, 7 Mo. 509, 514; Sadousky v. McGee, 4 J. J. Marsh. (Ky.) 267, 275.

[5] In Texas, a deprivation of this right is error for which the judgment will be reversed, unless it appear that the party complaining has not been injured thereby (Ney v. Roth, 61 Tex. 374, 376), and in Iowa (what is substantially the same thing), "while the right to review such a question is not absolutely denied, yet there must be a clear case of prejudice in order to justify a reversal upon this ground." Preston v. Walker, 26 Iowa, 205, 207; Fountain v. West, 23 Iowa, 14; Goodpastor v. Voris, 8 Iowa, 335; Smith v. Cooper, 9 Iowa, 379; Woodward v. Laverty, 14 Iowa, 363; Viele v. Germania Ins. Co., 26 Iowa, 9, 45. In Wisconsin, this is a matter resting in the sound discretion of the trial judge, which discretion is subject to review only in cases of outrage or abuse. Marshall v. American Express Co., 7 Wis. 1, 19. A similar doctrine was suggested in a case in New York (Fry v. Bennett, 28 N. Y. 324, 331); but, as seen by cases cited in the preceding note, the rule in that State is now the same as in England. This doctrine also prevails in Arkansas (Pogue v. Joyner, 7 Ark. 462) and in Missouri (Reichard v. Manhattan Life Ins. Co., 31 Mo. 518; Farrell v. Brennan, 32 Mo. 328; McClintock v. Curd, 32 Mo. 411; Wade v. Scott, 7 Mo. 509; Tibeau v. Tibeau, 22 Mo. 77. This was at one time the rule in England; Goodtitle v. Braham, 4 T. R. 497; Branford v. Freeman, 1 Eng. Law and Eq. 444; Geach v. Ingall, 4 Mees. & W. 97; Booth v. Milns, 15 Mees. & W., 669; Doe v. Brayne, 5 Com. Bench, 555; Edwards v. Matthews, 16 L. J. Exch., 291. In New Hampshire, as late as 1850, it was regarded as an open question whether it was a matter of right or of discretion merely (Belknap v. Wendell, 21 N. H.

A statute prescribing which party shall have this right has been held mandatory.[6]

§ 2. *Confusing Ideas upon this Subject.*—Prior to the time when the question became settled in England, as will be hereafter stated, the English books were full of confusing ideas upon this subject. These ideas were propagated in this country, and they still disfigure our jurisprudence to a considerable extent. One of them was an attempt to formulate the rule in the proposition that the party sustaining the burden of proof,[7] or, as it is sometimes stated, the burden of the issue,[8] or of the issues,[9] or the affirmative of the issue or issues,[10] possesses the right to open and close the argument. In cases where the question was free from difficulty, these propositions have generally, though not always, conducted the courts to the right results; but the application of them has been attended with the difficulty which always attends in practice the application of general rules: by reason of their generality they have failed to supply a uniform test by which to decide every question of this kind whenever it arises—a thing which is extremely desirable when possible. The rule that the right rests with the party sustaining the burden of proof is not adequate, because in many cases the plaintiff sustains the burden as to some slight or almost formal matter, after which the burden shifts upon the defendant, and either remains with him throughout the case, or else, as sometimes happens, shifts back again upon the plaintiff. In these cases, how is the rule to be applied? The plaintiff sustains the burden at the threshold; he must go forward and produce *some* evidence, albeit sleight or formal, such as the introduction of a written instrument, or the proof of a signature, while the substantial contest in the case grows out of defensive matter pleaded by his antagonist. The same may be said substantially as to the rule that the right rests with the party having the burden of the issue, which means the same thing as the burden of proof. Nor has the statutory rule in Indiana and Iowa that the right rests with the party having the burden of the issues, supplied an unvarying rule for the decision of the question; since in many cases the plaintiff will have the burden of a single issue, and the defendant will have the burden of many others. The same may be said concerning the rule that the right rests with the party having the affirmative of the issues. Although it is conceded that the question must be determined by the trial judge on an inspection of the pleadings,[11] yet is the question to be determined by the *form* of the issues, as held in Texas,[12] or by the *substance* of them, as held in New Hampshire,[13] Kentucky[14] and New York?[15] Again, suppose that the defendant in his plea or answer admits everything which the plaintiff alleges as the ground of his right of action, except the amount of his damages, these being unliquidated, as in actions for libel, where the fact of the publication is admitted, is the

175, 182); but, as above seen, it is now regarded in that State as a matter of right.

[6] Heffron v. State, 8 Fla. 73.

[7] Ransome v. Christian, 56 Ga. 351; Baker v. Lyman, 53 Ga. 339; Com. v. Haskell, 2 Brewst. (Pa.) 491; Hudson v. Wetherington, 79 N. C. 3; Bradley v. Clark, 1 Cush. 293; Patton v. Hamilton, 12 Ind. 256; Shank v. Fleming, 9 Ind. 189; Mason v. Croom, 24 Ga. 211; Higdon v. Higdon, 6 J. J. Marsh. (Ky.) 48; Bertody v. Ison, 69 Ga. 317; Judah v. Trustees, 23 Ind. 272; Baltimore, etc. R. Co. v. McWhitney, 36 Ind. 436; Hyatt v. Clements, 65 Ind. 12; Hill v. Perry, 82 Ind. 31; Wright v. Abbott, 85 Ind. 154; Goodwin v. Smith, 72 Ind. 113; Johnson v. Josephs, 75 Me. 544; Tobin v. Jenkins, 29 Ark. 151, 153; Yingling v. Hesson, 16 Md. 112, 121; Waller v. Morgan, 18 B. Monr. (Ky.) 137, 144; 1 Greenl. Ev. § 74 and note.

[8] McLees v. Felt, 1 Ind. 218.

[9] 2 Rev. Stat. Ind., p. 109; Ind. Code Pr. § 326; Iowa, Rev. 1860, § 3047; Judah v. Trustees, 23 Ind. 274, 283; distinguishing Howard v. Kisling, 15 Ind. 83 and Aurora v. Cobb, 21 Ind. 492. Compare McLees v. Felt, 11 Ind. 218; Ashing v. Miles, 16 Ind. 329.

[10] Goss v. Turner, 21 Vt. 440; Dunlop v. Peter, 1 Cranch C. C. 403; Beale v. Newton, 1 Cranch C. C. 405; Van Cleave v. Beam, 2 Dana (Ky,), 155; (compare Higdon v. Higdon, 6 J. J. Marsh. (Ky.) 50; Randolph Bank v. Armstrong, 11 Iowa, 51; Daviess v. Arbuckle, 1 Dana (Ky.), 525; Goldsberg v. Stuteville, 3 Bibb (Ky.), 346; Latham v. Selkirk, 11 Tex. 314, 322; Auld v. Hepburn, 1 Cranch C. C. 122. Compare Sutton v. Mandeville, 1 Cranch C. C. 187; Buzzell v. Snell, 25 N. H. 474, 478; Chesley v. Chesley, 27 N. H. 229; Hopper v. Demarest, 21 N. J. L. 526, 530; Denney v. Bock, 2 Bibb (Ky.), 427; Page v. Carter, 8 B. Monr. 192; Marshall v. Am. Express Co., 7 Wis. 1, 18; Reichard v. Manhattan Life Ins. Co., 31 Mo. 518; Banning v. Banning, 12 Oh. St. 437; Ross v. Gould, 5 Greenl. (Me.) 210; Belknap v. Wendell, 21 N. H. 175; Curtis v. Wheeler, 1 Mood. & M. 493; Montgomery v. Swindler, 32 Oh. St. 224; Jackson v. Hesketh, 2 Stark N. P. 518; Millerd v. Thorn, 56 N. Y. 402; Claflin v. Baere, 28 Hun (N. Y.), 204; Colwell v. Brower, 75 Ill. 517, 523.

[11] Dahlman v. Hammel, 45 Wis. 466; Richards v. Nixon, 20 Pa. St. 19, 23.

[12] Latham v. Selkirk, 11 Tex. 314, 322.

[13] Chesley v. Chesley, 27 N. H. 229, 237. See also Bills v. Vose, 27 N. H. 215; Thurston v. Kennett, 22 N. H. 151.

[14] Daviess v. Arbukle, 1 Dana, 525.

[15] Huntington v. Conkey, 35 Barb. (N. Y.) 218, 228.

burden of proof, or the burden of the issue or issues, or the affirmative of the issue to be held to be on the plaintiff or on the defendant? The general terms in which the rule has been variously formulated, as above given, do not furnish a uniform test by which to determine these questions.

§ 3. *The Plaintiff Begins where he has Anything to Prove.*—The English decisions upon this subject being in a state of confusion,[16] a decision was rendered in the Queen's Bench in the year 1845, which settled previous conflicts and established a rule which furnishes an absolute test for the decision of the question in all ordinary actions between plaintiff and defendant. That rule is this: That where the plaintiff has anything to prove, in order to get a verdict, whether in an action *ex contractu* or *ex delicto*, and whether to establish his right of action or to fix the amount of his damages, the right to begin and reply belongs to him.[17] This rule has been generally adopted in this country, as the decisions hereafter cited will show. The unvarying *test* furnished by this rule is to consider which party would, in the state of the pleadings and of the record admissions, get a verdict for substantial damages, if the cause were submitted to the jury without any evidence being offered by either. If the plaintiff would succeed, then there is nothing for him to prove at the outset, and the defendant begins and replies; if the defendant would succeed, then there is something for the plaintiff to prove at the outset, and the plaintiff begins and replies.[18]

§ 4. *What this Rule Decides.*—The advantage of this rule is that it *defines* the general propositions stated in the preceding paragraph and tells us the precise meaning of them. It tells us that the party sustaining the burden of proof, or the burden of the issue or issues, or the affirmative of the issue or issues, is in every case the plaintiff, where he has anything, however slight, to prove, in order to get a verdict for other than nominal damages; and that in every other case it is the defendant.[19] It tells us that, although the burden of proof may *shift* during the trial, yet the right to open and close the argument does not shift with it, but that the right remains with the party on whom it primarily rested.[20] It decides that where there are *several issues* and the plaintiff has anything to prove under any one of them in the first instance, in order to a recovery the right to open and close is with him.[21] It tells

[16] Curtis v. Wheeler, Mood. & M. 493; Hoggett v. Oxley, 2 Mood. & Rob. 251; Burrell v. Nicholson, 1 Mood. & Rob. 304; Carter v. Jones, 1 Mood. & Rob. 281; s. c., 6 Carr. & P. 64; Staunton v. Paton, 1 Carr. & Kir. 148; Rowland v. Bernes, 1 Carr. & Kir. 44; Bird v. Higginson, 2 Ad. & El. 160; Huckman v. Fernie, 3 Mees. & W. 505; Mills v. Barber, 1 Mees. & W. 425; s. c., Tyr. & G. 835; Lewis v. Parker, 4 Ad. & El. 838; Bedell v. Russell, Ry. & M. 293; Bonfield v. Smith, 2 Mood. & Rob. 519; Pearson v. Coles, 1 Mood. & Rob. 206; Pole v. Rogers, 2 Mood. & Rob. 287; Reeve v. Underhim, 1 Mood. & Rob. 440; Wootton v. Barton, 1 Mood. & Rob. 518; Jackson v. Hesketh, 2 Stark N. P. 518; Revett v. Braham, 4 T. R. 497.

[17] Mercer v. Whall, 5 Ad. & El. (N. S.) 447, overruling Cooper v. Wackley, Mood. & Malk. 248.

[18] Huckman v. Fernie, 2 Jur. 444; Veiths v. Hogge, 8 Clarke Ia. 163; Robinson v. Hitchcock, 4 Metc. (Mass.) 64; Perkins v. Ermell, 2 Kan. 325, 330; Amos v. Hughes, 1 Mood. & R. 464; Ridgway v. Eubank, 2 Mood. & R. 217; McConnell v. Kitchens, 20 S. C. 430, 433; Boyce v. Lake, 17 S. C. 481; Kennedy v. Moore, 17 S. C. 464; Burckhalter v. Coward, 16 S. C. 435; Brown v. Kirkpatrick, 5 S. C. 267.

[19] Johnson v. Josephs, 75 Me. 544; Spaulding v. Hood, 8 Cush. (Mass.) 602; Thurston v. Kennett, 22 N. H. 151; Belknap v. Wendell, 21 N. H. 175; Lunt v. Wormell, 19 Me. 100; Sawyer v. Hopkins, 22 Me. 276; Washington Ice Co. v. Webster, 6 Me. 449; Page v. Osgood, 2 Gray (Mass.), 260; Dorr v. Fremont National Bank, 120 Mass. 359; Comstock v. Hadlyme Ecc. Soc., 8 Comm. 254, 261; Bills v. Vose, 27 N. H. 212; Chesley v. Chesley, 27 N. H. 229; Seavey v. Dearborn, 19 N. H. 351; Fetters v. Muncie National Bank, 34 Ind. 35; Baltimore, etc. R. Co. v. McWhinney, 36 Ind. 436, 444; Hamlin v. Nesbitt, 37 Ind. 284; Thompson v. Mills, 39 Ind. 528; Williams v. Allen, 40 Ind. 295; Camp v. Brown, 48 Ind. 575; Aurora v. Cobb, 21 Ind. 493, 509; Shaw v. Barnhart, 17 Ind. 183; Buzzell v. Snell, 25 N. H. 474, 478; Hoxie v. Greene, 37 How. Pr. (N. Y.) 97, Carter v. Jones, 6 Carr. & P. 64; s. c., 1 Mood. & Rob. 281; Amos v. Hughes, 1 Mood. & Rob. 464; Rogers v. Desmond, 13 Ark. 474. Compare Pope v. Latham, 1 Ark. 66; Finley v. Woodruff, 3 Eng. (Ark.) 328.

[20] Brooks v. Barrett, 7 Pick. (Mass.) 94, 100; Belknap v. Wendle, 21 N. H. 175; Judge of Probate v. Stone, 44 N. H. 593, 602; Russ v. Gould, 5 Greenl. (Me.) 204. Compare Clear v. Sodo, Mood. & M. 85; Weidman v. Cohr, 13 Serg. & R. 17, 24; Cothran v. Forsythe, 68 Ga. 560.

[21] Cent. Bank v. St. John, 17 Wis. 157; Davidson v. Henope, 1 Cranch C. C. 405; Churchill v. Lee, 77 N. C. 341; Jackson v. Pittsford, 8 Blackf. (Ind.) 194; Jackson v. Hesketh, 2 Stark. N. P. 518; Ridgway v. Eubank, 2 Mood. & Rob. 217; Burckhalter v. Coward, 16 S. C. 435, 442; Johnson v. Maxwell, 87 N. C. 18; Bertrand v. Taylor, 32 Ark. 470; Zehner v. Kepner, 16 Ind. 290; Bowen v. Spears, 20 Ind. 146; Viele v. Germania Ins. Co., 26 Ia. 10, 45; Vieths v. Hogge, 8 Ia. 192; Sillivant v. Reardon, 5 Ark. 141, 157. Compare Sadousky v. McGee, 4 J. J. Marsh. (Ky.) 267, 274, where the subject is reasoned forcibly and at length by Robertson, C. J., taking some positions which are not in conformity with the above rule.

us that in every case where the *general issue*, or a general or special denial is pleaded, the right to open and close is with the plaintiff, no matter what may be the nature of the controversy, or what special defenses or counterclaims may be set up.[22]

§ 5. *In Actions for Unliquidated Damages.*—It decides that, in all actions for unliquidated damages, except where the defendant, by his plea or answer, admits not only the cause of action but also the amount of damages claimed, the right is with the plaintiff; since he must introduce evidence showing the extent of his injury[23]—as where, in any action sounding in damages the cause of action is admitted, and a plea of confession and avoidance is filed, leaving the amount of damages claimed subject to affirmative proof.[24] Thus, in actions for libel or slander where the defendant admits the writing or speaking and pleads justification, or claims privilege and denies malice, the right, according to the modern doctrine, is with the plaintiff. The reason is that the question of malice and of the extent of the damages are both in issue, and that the plaintiff has therefore something to prove in order to make out his case.[25] For the same reasons, in an action for *assault* and *battery*, where the plea is *son assault demense*, followed by a replication *de injuria*, or, as we would say in modern procedûre, where the answer is a *justification*, the plaintiff begins and replies; since he must first go forward with his evidence.[26] So, in trespass *de bonis asportatis*, where the defendant pleads the general issue and files "a brief statement" justifying under his authority as an officer, the right is with the plaintiff.[27]

§ 6. *In Actions on Contracts which Liquidate the Damages.*—On the other hand, where the action is upon a contract which, by its terms, *liquidates the damages*—as upon a

[22] Ayer v. Austin, 6 Pick. 225; Tappan v. Jenness, 21 N. H. 232; Jackson v. Pittsford, 8 Blackf. (Ind.) 194; Burroughs v. Hunt, 13 Ind. 178; Denny v. Book, 2 Bibb (Ky.), 427; Cox v. Vickers, 35 Ind. 27; Robinson v. Hitchcock, 8 Metc. (Mass.) 64, 66; Perkins v. Ermell, 2 Kan. 325, 330; Judge of Probate v. Stone, 44 N. H. 593, 602; Belknap v. Wendell, 21 N. H. 175; Thurston v. Kennett, 22 N. H. 151; Buzzell v. Snell, 25 N. H. 478; Brooks v. Barrett, 7 Pick. (Mass.) 100; Chesley v. Chesley, 27 N. H. 227, 237. So, where matter is affirmatively pleaded which amounts merely to the general issue: Denny v. Book, 2 Bibb (Ky.), 427. Compare, *contra* to the text, Bangs v. Snow, 1 Mass. 181.

[23] Mercer v. Whall, 5 Ad. & El. (N. S.) 447, 461; Aurora v. Cobb, 21 Ind. 493, 509; Haines v. Kent, 11 Ind. 26; Young v. Highland, 9 Gratt. (Va.) 16; Stepton v. Harvey, 7 Leigh. (Va.) 501, 544: Cunningham v. Gallagher, 61 Wis. 170; Opdyke v. Weed, 18 Abb. Pr. (N. Y.) 223, *n;* Ecker v. Hopkins, 16 Abb. Pr. (N. Y.) 301, *n.*

[24] Cunningham v. Gallagher, *supra.*

[25] Vifquain v. Finch, 15 Neb. 505; Burckhalter v. Coward, 16 S. C. 435, 443; Fry v. Bennett, 3 Bosw. (N. Y.) 200, 232; s. c., affirmed, 28 N. Y. 324. The decision of Lord Tenterden, in Cooper v. Wakley, Mood. & M. 248, has been overruled in England, and has not been the law in that country since the decision in Mercer v. Whall, 5 Ad. & El. (N. S.) 447, 463, in which last case Lord Denman said: "If ever a decision was overruled on great deliberation, and by an undeviating practice afterwards, it was that in Cooper v. Wakley." The English judges, soon after the accession of Lord Denman to the office of chief justice of the Queen's bench, met and discussed this troublesome question, and adopted the following rule: "In actions for libel, slander and injuries to the person, the plaintiff shall begin, although the affirmative is on the defendant." A sketch of this rule is given by Lord Denman in his opinion in Mercer v. Whall, *supra.* Two American decisions (Moses v. Gatewood, 5 Rich. L. (S. C.) 234, and Ransone v. Christian, 56 Ga. 351) hold that, in actions for libel or slander, where the defendant pleads justification, he assumes the affirmative, and the right to begin and reply is with him; but these decisions are contrary to principle and entirely out of current with modern authority.

[26] Young v. Highland, 9 Gratt. (Va.) 16; Johnson v. Josephs, 75 Me. 544. *Contra*, and out of line with modern authority, are the following old cases: McKenzie v. Milligan, 1 Bay (S. C.), 248; Goldsberry v. Stuteville, 3 Bibb (Ky.), 345; Downey v. Day, 4 Ind. 431. Compare Van Zant v. Jones, 3 Dana (Ky.), 465, where, in such a state of pleading, the defendant offered no substantial evidence of justification, and it was held that the court might, in the exercise of a sound discretion, withhold from him the advantage, which the court supposed the form of the pleadings gave him, by giving the right to open and close to the plaintiff.

[27] Lunt v. Wormell, 19 Me. 100; Ayer v. Austin, 6 Pick. (Mass.) 225, overruling Bangs v. Snow, 1 Mass. 181. It has been held in old cases, contrary to the general principle stated in the text that, in such an action, where justification only is pleaded, the defendant is entitled to open and close. Kimble v. Adair, 2 Blackf.) Ind.) 220; Denny v. Day, 4 Ind. 531. So, it has been held that, in an action of trespass *quare clausum*, where the defendant pleads freehold only, the right to begin and reply is with him. Singleton v. Millett, Nott & McC. (S. C.) 355; Davis v. Mason, 4 Pick. (Mass.) 156. And one English case holds that this is so, although the declaration alleges special damage. Fish v. Travers, 3 Carr. & P. 578. But these two classes of decisions seem to be opposed to the modern rule stated in the text, since in either case the damages being unliquidated and not admitted in the state of the pleadings, the plaintiff has something to prove in order to get a verdict. See Haines v. Kent, 11 Ind. 26.

promissory note,[28] bill of exchange,[29] bank check,[30] bill single,[31] policy of life[32] or fire,[33] or any other written instrument which by its terms fixes the amount of the recovery[34]—and the defendant admits the execution of the instrument but sets up an affirmative defense,[35] such as duress,[36] fraud,[37] want of jurisdiction,[38] usury,[39] a discharge under an insolvent debtor's act[40] or in bankruptcy,[41] want of title in the plaintiff,[42] tender,[43] or other matter in defense,[44] or pleads a set-off or counterclaim[45]—in all such cases the plaintiff has nothing to prove in order to recover; upon a default an inquiry of damages would be unnecessary; and therefore the right to begin and reply is with the defendant.

§ 7. *In Actions on Contracts which do not Liquidate the Damages.*—Outside of these lie a mass of cases founded upon contracts, express or implied, where the contract itself does not liquidate the damages, and where, although the existence of the contract is admitted in the pleadings, the damages claimed are not admitted, or where defensive matter is set up, apparently in avoidance, but which really amounts to a denial of the grounds on which the right of recovery is predicated—in all which cases the right to begin and reply is with the plaintiff. Among these may be mentioned actions of debt on penal bonds where the plea is *nil debit*, performance, set-off, etc.—these pleas not dispensing with the necessity of proving the breaches and the damages,[46] actions for goods sold, answer admitting sale and delivery, but alleging that the goods were not equal to the quality agreed upon, and claiming a recoupment;[47] actions for the value of a physician's services and a plea in reconvention admitting the services, but alleging damages by reason of want of skill, etc.;[48] action on a promissory note providing for reasonable attorney's fees, defense of payment, set-off, etc., and an admission that a certain sum would be a reasonable attorney's fee if the plaintiff should recover the amount of the note—the admission not agreeing what would be a reasonable fee in case he should recover a *part* only of the note;[49] actions upon promises and pleas or answers alleging that the promise was a different promise from that sued on, since this leaves the burden upon the plaintiff of proving the promise which he has alleged;[50] covenant for dismissing a servant, justification—replication *de injuria*—since the damages are unliquidated and must be proved by the plaintiff;[51] covenant broken, general issue, with notice (under Massachusetts statute) of special defense of discharge under insolvent law, replication admitting discharge but denying its validity;[52] action

[28] Kimble v. Adair, 2 Blackf. (Ind.) 320; Bowen v. Spears, 20 Ind. 146; Harvey v. Ellithorpe, 26 Ill. 418; Tipton v. Triplett, 1 Metc. (Ky.) 570; Ayrault v. Chamberlin, 33 Barb. (N. Y.) 229; Huntington v. Conkey, 33 Barb. (N. Y.) 218; Hoxie v. Greene, 27 How. Pr. (N. Y.) 97; McShane v. Brinder, 66 How. Pr. (N. Y.) 294; Hudson v. Weatherington, 69 N. C. 3; Blackledge v. Pine, 28 Ind. 466; Judah v. Trustees, 23 Ind. 272; Shank v. Fleming, 9 Ind. 189.

[29] Warner v. Haines, 6 Carr. & P. 666; List v. Cartepeter, 26 Ind. 27.

[30] Elwell v. Chamberlin, 31 N, Y. 611.

[31] Richards v. Nixon, 20 Pa. St. 19, 23; Scott v. Hull, 8 Conn. 296. Compare Robinson v. Hitchcock, 8 Metc. (Mass.) 64.

[32] Brennan v. Security Life Ins. Co., 4 Daly (N. Y.), 296. Compare, *contra*, Ashby v. Bates, 15 Mees. & W. 589.

[33] Viele v. Germania Ins. Co., 26 Iowa, 10, 44.

[34] Aurora v. Cobb, 21 Ind. 492, 509.

[35] Auld v. Hepburn, 1 Cranch C. C. 122.

[36] Hoxie v. Greene, 37 How. Pr. 97.

[37] Elwell v. Chamberlin, 31 N. Y. 611; Brennan v. Security Life Ins. Co., 4 Daly (N. Y.), 296

[38] Tipton v. Triplett, 1 Metc. (Ky.) 570; Hoxie v. Greene, 37 How. Pr. (N. Y.) 97; McShane v. Brinder, 66 How. Pr. (N. Y.) 294; List v. Cortepeter, 26 Ind. 27.

[39] Harvey v. Ellithorpe, 26 Ill. 418; Ayrault v. Chamberlain, 33 Barb. (N. Y.) 229; Huntington v. Conkey, 33 Barb. (N. Y.) 218; Elwell v. Chamberlin, 31 N. Y. 611.

[40] Warner v. Haines, 6 Carr. & P. 666.

[41] Richard v. Nixon, 20 Pa. St. 19, 23.

[42] Hoxie v. Greene, 37 How. Pr. (N. Y.) 97. Compare Hudson v. Weatherington, 79 N. C. 3, where it was held that, upon an issue upon a want of title in the plaintiff, the plaintiff must go forward with the evidence, and consequently has the right to begin and reply.

[43] Auld v. Hepburn, 1 Cranch C. C. 122. Compare Buzzell v. Snell, 25 N. H. 474.

[44] Blackledge v. Pine, 28 Ind. 466; Judah v. Trustee, 23 Ind. 272; Shank v. Fleming, 9 Ind. 189.

[45] Bowen v. Spears, 20 Ind. 146; Brown v. Kirkpatrick, 5 S. C. 267. Compare Penhryn Slate Co. v. Meyer, 8 Daly (N. Y.), 402; Graham v. Gautier, 21 Tex. 112.

[46] Sillivant v. Reardon, 5 Ark. 141, 157.

[47] Penhryn Slate Co. v. Meyer, 8 Daly (N. Y.), 402.

[48] Graham v. Gautier, 21 Tex. 112.

[49] Camp v. Brown, 48 Ind. 575.

[50] Daviess v. Evans, 6 Carr. & P. 619; McConnell v. Kitchens, 20 S. C. 430.

[51] Mercer v. Whall, 5 Ad. & El. (N. S.) 447 (leading English case). The following decisions are referred to as contrary to the principle of this case, and as having been wrongly decided: Page v. Carter, 8 B. Mon. (Ky.) 192; Sutton v. Mandeville, 1 Cranch C. C. 187.

[52] Robinson v. Hitchcock, 8 Metc. (Mass.) 64.

was upon a policy of life insurance—plea, misrepresentation by the assured, replication *de injuria*—the plea being in substance a mere denial of the averment in the declaration of the truth of the statement by which the assured had obtained the policy;[53] actions to foreclose mortgages, since the plaintiff must prove the mortgage debt and all other facts preliminary to his right of foreclosure;[54] an action on bills of exchange with a count on an account stated, plea of payment as to the bills and *non-assumpsit* as to the account stated—since the plaintiff must give some evidence in order to a recovery upon the account stated;[55] assumpsit for the unworkman-like execution of a contract, plea that the work was properly done;[56] action on an account, cause of action not admitted, defense of payment;[57] action upon a guaranty of payment of certain promissory notes, answer denying any indebtedness and setting up false and fraudulent representations, etc. —the reason being that it is incumbent on the plaintiff to prove the original indebtedness evidenced by the notes;[58] action for goods sold, general issue except as to a part of the sum demanded, as to that and plea of tender;[59] and many other similar cases which might be stated.

§ 8. *Doctrine of this Article Restated.*—The doctrine of this article cannot better be restated than in the language of Judge E. Darwin Smith at the conclusion of a learned opinion in the Supreme Court of New York: "1. The plaintiff, in all cases where the damages are unliquidated, has the right to open the case to the jury and of the reply. 2. Whenever the plaintiff has anything to prove, on the question of damages or otherwise, he has the right to begin. 3. In other cases where the damages are liquidated or depend on mere calculation—as the casting of interest—the party holding the affirmative of the issue has the right to begin. 4. The affirmative of the issue in such cases means the affirmative in substance, and not in form, and upon the whole record. 5. The denial of the right to begin, to the party entitled to it and claiming it at the proper time, is error, for which a new trial will be granted, unless the court can see clearly that no injury or injustice resulted from the erroneous decision."[60] The foundation of this doctrine is, as before stated, the leading case of Mercer v. Whall[61] to which most, though not all, American courts have conformed. While, as already stated, the rule of this case is sufficient for the decision of the question in every ordinary case, yet it must not be supposed that it furnishes the key to a decision of the question in every case. In a variety of special proceedings the question which the juror asked of the judge at the conclusion of his charge, "What does your honor mean by the words plaintiff and defendant?" is constantly recurring. To this question, as well as to several other topics connected with the subject, another article will be devoted, if thought of sufficient interest.

SEYMOUR D. THOMPSON.

[53] Ashby v. Bates, 15 Mees. & W. 589. Compare Viele v. Germania Ins. Co., 26 Iowa, 10, 44; Brennan v. Security Life Ins. Co., 4 Daly (N. Y.), 296.
[54] Mason v. Croom, 24 Ga. 211.
[55] Smart v. Rayner, 6 Carr. & P. 721.
[56] Amos v. Hughes, 1 Mood. & R. 464.
[57] Wright v. Abbott, 85 Ind. 154. See also Ashing v. Miles, 16 Ind. 329 (action for use and occupation).
[58] Dahlman v. Hammel, 45 Wis. 466, citing Second Ward Savings Bank v. Slackman, 30 Wis. 333.
[59] Buzzell v. Snell, 25 N. H. 474, 479.
[60] Huntington v. Conkey, 33 Barb. (N. Y.) 218, 228.
[61] 5 Ad. & El. (N. S.) 445.

RES ADJUDICATA—MANDAMUS.

THE UNITED STATES EX REL HARSHMAN V. THE KNOX COUNTY COURT.

Supreme Court of the United States, May 27, 1887.

1. *Res Adjudicata—Mandamus.*—In a proceeding by *mandamus* against county judges to compel them to levy a tax to pay a judgment obtained against the county on bonds, the judgment will be held conclusive of every material and traversable averment of fact in the petition on which the judgment is founded. Not even a recital in the bonds can be used to show that they are untrue.

2. *Judgment by Default.*—The fact that the judgment was by default does not change this rule.

3. *Material and Traversable Averment.*—Where a county court had power, in issuing bonds, to proceed under either of two laws, one of which required that a vote of the people be taken and the other did not, in a suit upon bonds issued by the court, an averment that they were issued in pursuance of the law requiring a vote, and that two-thirds of the qualified voters voted in favor of issuing them, is material and traversable, and is confessed by a default. It makes no difference that the judgment would have been the same whether they were issued under the one law or the other. Good pleading required that the fact, which ever way it was, should be stated, and when stated the averment must be proved as laid.

J. K. Skinker and *J. B. Henderson*, for plaintiff in error; *James Carr*, for defendant in error.

Mr. Justice MATTHEWS delivered the opinion of the court:

This is a proceeding by *mandamus* against the justices of the county court of Knox county to compel them to levy a tax sufficient to pay a judgment for $77,374.46, obtained by the relator, Harshman, on the 28th of March, 1881, against that county, in the circuit court for the eastern district of Missouri.

The information alleges that "said judgment was recovered upon bonds and coupons issued by the said county in part payment of a subscription made by the said county on the 9th day of June, 1867, to the capital stock of the Missouri and Mississippi Railroad Company, a railroad company duly organized under the laws of the State of Missouri; that said subscription was authorized by a vote of the people of said county at a special election held pursuant to an order of the county court of said county, on the 12th day of March, 1867, under the 17th section of chapter 63 of the General Statutes of Missouri of 1866, then in force; that at said election two-thirds of the qualified voters of said county voted in favor of, and assented to the making of said subscription; that relator has requested the said county court and the justices thereof to levy a special tax upon all property in said county made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in said county, and to cause the said tax to be collected in money, and when collected to be applied in payment and discharge of said judgment; that the said county court and the justices thereof have refused and neglected to levy the said tax; that the said county has no property out of which the said judgment can be levied, and that relator has no other adequate remedy at law."

The respondents made return to the alternative writ substantially as follows: They admit that the judgment of the relator was recovered upon bonds and coupons issued by the county of Knox in part payment of two subscriptions made by said county to the capital stock of the Missouri and Mississippi Railroad Company; but they deny that said subscriptions or either of them were authorized by a vote of the people of that county at either a general or special election held pursuant to an order of the county court of said county on the 12th day of March, 1867, or at any other time, under the 17th section of chapter 63 of the General Statutes of Missouri, then in force. They deny that two-thirds of the qualified voters of Knox county ever voted in favor of or assented to making any subscription to the capital stock of the Missouri and Mississippi Railroad Company. They aver that, in point of fact, on the 13th of May, 1867, the county court of said county made a subscription to the capital stock of said company in the sum of $100,000, and on the 2d of May, 1870, the said court made a further subscription to the capital stock of said company in the sum of $55,000. That, in payment of both of these subscriptions, the said court issued bonds in the denominations of $500 and $50; that fifty-eight of the relator's said bonds are of the first of these issues, and sixty are of the second; that both of these subscriptions were made without the assent of two-thirds of the qualified voters of the county, and, indeed, without any vote being taken at all, and against the will of said qualified voters; that they were made by authority only of section 13 of the charter of the Missouri and Mississippi Railroad Company, being an act of the general assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20, 1865; that each of relator's said bonds contains a recital that is issued under and pursuant to orders of the county court of Knox county to the Missouri and Mississippi Railroad Company, for subscriptions to the capital stock of said company, as authorized by said act, to incorporate the Missouri and Mississippi Railroad Company, approved February 20, 1865; and that said court has each year since the issue of said bonds levied a tax of one-twentieth of one per cent. upon the assessed value of all the taxable property in said county, and has caused the same to be extended on the tax books of said county for each year, and has had said tax collected for the purpose of paying said bonds and coupons; that Knox county has no money in its treasury with which to pay the relator's judgment, and that the judges of Knox county have no legal authority to levy any other or greater taxes than the taxes as hereinbefore stated, and no legal authority or power to levy or cause to be collected the special tax which the relator seeks to have imposed.

On the coming in of his return, the relator moved the court to quash the same on the ground that the matters and things therein set forth were inconsistent with and contradictory to the record of the judgment in the case. This motion was overruled by the court, to which ruling an exception was taken.

An answer to the return was filed by the relator, in which were set forth the various steps and proceedings taken, as therein alleged, by the authorities and people of the county of Knox, in respect to the issue of the bonds on which the judgment was founded, claiming that an election was duly had by an order of the county court under the authority of the general laws of Missouri, in virtue of which the subscription to the stock of the railroad company was made and the bonds in question issued. To this answer a replication was filed, and the case was submitted to a jury.

On the trial, as appears by a bill of exceptions duly taken, the relator offered to read in evidence the petition, summons, marshal's return and judgment referred to in the information. On objection made by the respondents, the court ruled that these papers could not be read unless the

relator would also read the bonds filed with said petition, to which ruling the relator excepted. The relator then put in evidence the said papers and also the said bonds.

The petition in the original action sets out "that, on the 9th day of June, 1867, defendant subscribed to the capital stock of the Missouri and Mississippi Railroad Company, a railroad company duly organized under the laws of the State, the sum of one hundred thousand dollars; that said subscription was authorized by a vote of the people of said county of Knox at a special election held pursuant to an order of the county court of said county on the 12th day of March, 1867, under the 17th section of chapter 63 of the General Statutes of Missouri of 1866, then in force; that at said election two-thirds of the qualified voters of said county voted in favor of and assented to the making of said subscription; that in part payment of said subscription defendant, by its county court, executed and issued divers bonds with coupons for interest attached; that by each of said bonds defendants promised to pay to bearer, at the National Bank of Commerce, in the city of New York, on the first day of February, 1878, the sum of five hundred dollars, with interest at the rate of seven per cent. per annum; that said coupons for interest were due and are payable on the first day of February of each year between the issuing of said bonds and the maturity thereof; that by each of said coupons defendant promised to pay bearer the sum of thirty-five dollars, being one year's interest on the bond to which it was attached; that, in further payment in part of said subscription, defendant executed and issued divers other bonds with coupons for interest attached; that by each of said bonds defendant promised to pay to bearer, at the National Bank of Commerce, in the city of New York, on the first day of February, 1880, the sum of five hundred dollars, with interest at the rate of seven per cent. per annum; that said coupons for interest were made payable on the first day of February of each year, between the issuing of said bonds and the maturity thereof; that by each of said coupons defendant promised to pay to bearer the sum of thirty-five dollars, being one year's interest on the bond to which it was attached."

The petition also sets out that the plaintiff is the bearer and owner of divers of said bonds and coupons, designated by numbers. The return of the summons shows that the writ was duly served, and judgment was rendered thereon March 28, 1881, by default, which sets forth that "this action being founded upon certain bonds and coupons for interest thereon, issued by said defendant, and described in the petition, the court finds that the plaintiff has sustained damages by reason of the non-payment thereof in the sum of $77,374.46. It is, therefore, considered by the court, that the plaintiff, George W. Harshman, have and recover of the defendant, the county of Knox, as well as the said sum of $77,374.46, the damages aforesaid by the court assessed, as also the costs herein expended, and have thereof execution."

Each of the bonds contains the following recital: "This bond being issued under and pursuant to order of the county court of Knox county for subscription to the stock of the Missouri and Mississippi Railroad Company, as authorized by an act of the general assembly of the State of Missouri, entitled, 'An act to incorporate the Missouri and Mississippi Railroad Company,' approved February 20, 1865."

The issues of fact submitted to the jury were as follows:

"First. Was there an election held under the orders of the county court read in evidence, and did two-thirds of the qualified voters voting at said election cast their votes in favor of the subscription by the county court to the stock mentioned in said orders?

"Second. Was the subscription to stock to the railroad company actually made, not as recited in said bonds, under the charter of the M. & M. R. R. Co., but under the general law, whereby the authority to make such subscription and issue bonds therefor was dependent on the vote of the people; in other words, has the relator proved that, despite the recitals in the bonds, they were not issued as recited, but under the general law, and that said recitals in the bonds were made through mistake or inadvertence."

At the conclusion of the evidence the court instructed the jury "that, to overcome the recitals in the bonds issued by the county court under its seal, the evidence must be clear and positive, full and explicit, and that the burden of proving the alleged mistake, so as to overthrow the said recitals, is upon the relator in this case," and "that the evidence to overcome said recitals is insufficient."

In answer to these questions, the jury found in the affirmative on the first, and in the negative on the second; and thereupon the court entered a judgment in favor of the respondents, in which it is recited that it appeared to the court "that there was an election held under orders of the county court of Knox county, and that two-thirds of the qualified voters voting at said election cast their votes in favor of the subscription by the said court to the stock mentioned in its orders, but that the subscription to the stock of the Missouri and Mississippi Railroad Company was actually made and bonds issued, not as alleged in the petition and alternative writ in this case, under the general law of the State of Missouri, but solely under and by virtue of an act of the general assembly of the State of Missouri, entitled, 'An act to incorporate the Missouri and Mississippi Railroad Company,' approved February 20, 1865."

The charter of the Missouri and Mississippi Railroad Company referred to incorporates it with power to construct a railroad from the town of Macon, in the county of Macon, in the State of Missouri, through the town of Edina, in the

county of Knox, in said State, and thence to or near the northeast corner of said State, in the direction of Keokuk, in Iowa, or Alexandria, Missouri. The 13th section is as follows:

"Sec. 13. It shall be lawful for the corporate authorities of any city or town, the county court of any county desiring to do so, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year."

On the other hand, sections 17 and 18 of the general railroad law (Gen. Stat. Mo. 1865, page 338), provide as follows:

"Sec. 17. It shall be lawful for the county court of any county, the city council of any city, or the trustees of any incorporated town, to take stock for such county, city, or town in, or loan the credit thereof to, any railroad company duly organized under this or any other law of the State: Provided, that two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent to such subscription.

"Sec. 18. Upon the making of such subscription by any county court, city, or town, as provided for in the previous section, such county, city, or town shall thereupon become, like other subscribers to such stock, entitled to the privileges granted and subject to the liabilities imposed by this chapter, or by the charter of the company in which such subscriptions shall be made; and in order to raise funds to pay the installments which may be called for from time to time by the board of directors of such railroad, it shall be the duty of the county court, or city council, or trustees of such town, making such subscription, to issue their bonds or levy a special tax upon all property made taxable by law for county purposes, and upon the actual capital that all merchants and grocers and other business men may have invested in business in the county, city, or town, to pay such installments, to be kept apart from other funds, and appropriated to no other purpose than the payment of such subcription."

It is not denied, and has been so decided by the Supreme Court of Missouri, that, under section 17 of the general railroad law just cited, the county court of a county was authorized to subscribe to the stock of railroad companies, though created by special charter, provided the requisite assent of the qualified voters was duly obtained. Cape Girardeau, etc. Co. v. Dennis, 67 Mo. 438; Chouteau v. Allen, 70 Mo. 290.

It is also not denied that, by virtue of section 18 of the general railroad law, the special tax therein provided may be levied for the purpose of paying bonds issued in pursuance thereof, and that without limit as to its amount. U. S. v. The County of Macon, 99 U. S. 582. As the limit of taxation prescribed and permitted under section 13 of the act incorporating the Missouri and Mississippi Railroad Company, to be levied in payment of bonds issued thereunder, was not to exceed one-twentieth of one per cent. upon the assessed value of the taxable property for each year, the contention of the respondents in the circuit court was, that they were entitled to show by the recitals in the bonds themselves, in contradiction to those contained in the judgment founded upon them, that they were in fact issued under the charter of the corporation, and not under the general law. On this point, the judgment of the circuit court was in their favor, denying to the relator the peremptory writ of *mandamus*, and this decision is now alleged as error, for which the judgment should be reversed.

The question is, whether the respondents below are estopped in this proceeding by the judgment in favor of the relator against the county of Knox on the bonds, to deny that the bonds were issued in pursuance of section 17, chapter 63, of the General Statutes of Missouri of 1866. The averment to that effect in the petition in the action, if material and traversable, was confessed by the default. The judgment recites that the action is founded upon certain bonds and coupons for interest thereon issued by said defendant and described in the petition. The averment as to the character of the bonds, and the grounds and authority upon which they were founded, so as to constitute them legal obligations of the county of Knox, contained in the petition, was clearly material to the plaintiff's cause of action. If the defendant had denied it by a proper pleading, the fact would have been put in issue, and the plaintiff would have been bound to prove it.

It was part of the plaintiff's case to show, not merely the execution of the bonds by the county authorities, but that they were issued in pursuance of a law making them the valid obligations of the county. The power to issue such securities does not inhere in a municipal corporation, so as to be implied from its corporate existence; it must be conferred, either in express words, or by reasonable intendment; and if the authority to issue them in a given case is challenged by a proper denial, the plaintiff is put to the proof. What it is necessary for him to prove, it is proper for him to allege, and the allegation must be proven as made. It follows, therefore, that if a denial had been made in the action on the bonds in question, the averment that they were issued under section 17, chapter 63, of the General Statutes of Missouri of 1866, would have been material and traversable, and proof of the fact would have been necessary to support the recovery. In the absence of a denial, the fact as stated in the petition of the plaintiff is confessed by the default, and stands as an admission on the record, of its truth of the defendant. It is quite true that the judgment would have been the same whether the authority to issue the bonds was derived under the general statutes or under the charter of the railroad company, but good pleading required that the fact, whichever way it was,

should be stated, and when stated the averment must be proved as laid.

As this is a direct proceeding upon the judgment, its effect as an estoppel is determined by the first branch of the rule as laid down in Cromwell v. The County of Sac, 94 U. S. 351. That is: "It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." And as stated in Burlen v. Shannon, 99 Mass. 200, 203: "The estoppel is not confined to the judgment, but extends to all facts involved in it, as necessary steps or the groundwork upon which it must have been founded." It is none the less conclusive because rendered by default. "The conclusiveness of a judgment upon the rights of the parties does in nowise depend upon its form or upon the fact that the court investigated or decided the legal principles involved; a judgment by default or upon confession is in its nature just as conclusive upon the rights of the parties before the court as a judgment upon a demurrer or verdict." Gifford v. Thorn, 9 N. J. Equity, 722. The bar is all the more perfect and complete in this proceeding because it is not a new action. *Mandamus*, as it has been repeatedly decided by this court, in such cases as the present, is a remedy in the nature of an execution for the purpose of collecting the judgment. Riggs v. Johnson County, 6 Wallace, 166; Supervisors v. Durant, 9 Wallace, 417; Thompson v. United States, 103 U. S. 484. Certainly nothing that contradicts the record of the judgment can be alleged in a proceeding at law for its collection by execution.

In Ralls Co. v. U. S., 105 U. S. 733, the chief justice said: "In the return to the alternative writ many defenses were set up which related to the validity of the coupons on which the judgment had been obtained, as obligations of the county. As to these defenses, it is sufficient to say it was conclusively settled by the judgment, which lies at the foundation of the present suit, that the coupons were binding obligations of the county, duly created under the authority of the charter of the railroad company, and as such entitled to payment out of any fund that could lawfully be raised for that purpose. It has been in effect so decided by the Supreme Court of Missouri, in State v. Rainey, 74 Mo. 229, and the principle on which the decisions rests is elementary."

As the execution follows the nature of the judgment, and its precept is to carry into effect the rights of the plaintiff as declared by the judgment, with that mode and measure of redress which in such cases the law gives, so the *mandamus* in a case like the present can be limited in its mandate only by that which the judgment itself declares.

It was said, however, in Ralls County v. The United States, 105 U. S. 733, that "while the coupons are merged in the judgment, they carry with them into the judgment all the remedies which in law formed a part of their contract obligations, and these remedies may still be enforced in all proper ways, notwithstanding the change in the form of the debt." It is argued from this, that, as the remedies to be resorted to for the purpose of enforcing the judgment are those given by the original contract, it is necessary to ascertain from the contract itself what those remedies are; but that is the very matter which has been already passed upon in the judgment, which decides, in the present case, by its recital, the character and extent of the obligation created by the law of the contract. It may well be that in a case where the record of the judgment is silent on the point, the original contract may be shown, notwithstanding the merger, to determine the extent of the remedy provided by the law for its enforcement; but that is not admissible where, as in this case, the matter has been adjudged in the original action. Indeed, in view of the nature of the remedy by *mandamus*, as the means of executing the judgment, it is all the more material and important that the judgment itself should determine the nature of the contract and the extent of its obligations. The averment in the original petition that the bonds were issued under the authority of a particular statute becomes, therefore, an additional element in the plaintiff's case in that action for the purpose of showing with certainty what is the mode and measure of redress after judgment. By the terms of the judgment in favor of the relator, it was determined that the bonds sued on were issued under the authority of a statute which prescribed no limit to the rate of taxation for their payment. In such cases, the law which authorizes the issue of the bonds gives also the means of payment by taxation. The findings in the judgment on that point are conclusive. They bind the respondents in their official capacity, as well as the county itself, because, as was said in Labette County Commissioners v. Moulton, 112 U. S. 217, "they are the legal representatives of the defendant in that judgment, as being the parties on whom the law has cast the duty of providing for its satisfaction. They are not strangers to it as being new parties on whom an original obligation is sought to be charged, but are bound by it as it stands without the right to question it, and under a legal duty to take those steps which the law has prescribed as the only mode of providing means for its payment."

The return of the respondents, therefore, to the alternative writ of *mandamus* is sufficient in law, and the circuit court erred in not awarding to the relator a peremptory writ of *mandamus*. For that error the judgment is reversed, and the cause remanded, with directions to award a peremptory *mandamus*.

NOTE.—It is an elementary principle of the law of *res adjudicata* that "it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which create the estoppel."[1] It is the "allegation on record" which estops.[2]

The doctrine of the principal case has often been applied in one form or another in *mandamus* proceedings. In United States v. New Orleans,[3] Field, J., said: "In the present case, the indebtedness of the city of New Orleans is conclusively established by the judgments recovered. The validity of the bonds upon which they were rendered is not now open to question. Nor is the payment of the judgment restricted to any species of property or revenues, or subject to any conditions. The indebtedness is absolute. If there were any question originally as to a limitation of the means by which the bonds were to be paid, it is cut off from consideration now by the judgments. If a limitation existed, it should have been insisted upon when the suits on the bonds were pending, and continued in the judgments. The fact that none is thus continued is conclusive on this application that none existed."

In State v. Macon County Court,[4] Hough, J., said: "I doubt, however, whether we are at liberty to go behind the judgment in favor of the relator, and inquire into the cause of action or obligation upon which it is founded, and then say that the judgment must be paid according to the terms of the contract on which it is based. The judgment should have followed the contract; and in that it does not, it is an erroneous judgment. It is a general judgment, entitling the relator to a general execution, and if the county has property subject to execution it might be sold thereunder. The contract is merged in the judgment, and it cannot, in my opinion, now be looked to determine the rights of the relator under his judgment."

Generally speaking, in *mandamus* proceedings to enforce a judgment on bonds, no question can be raised touching the legality of the bonds. *Ex. Gr.* That they were not sanctioned by the requisite popular vote.[5] Or that they were issued after the enactment of a statute requiring registration by the State auditor, but were not registered.[6] Or that they were not executed by the lawful officers of the county, or that plaintiff was not a *bona fide* holder.[7] The judgment conclusively establishes the validity of the bonds.[8] Nor can objection be made on the ground that the judgment includes an illegal allowance of interest.[9] In Nelson v. St. Martin's Parish,[10] it is held that, on appeal from a judgment ordering the issue of a *mandamus* to compel the collection of a tax to pay a judgment recovered against a municipal corporation, the appellate court may authorize an inquiry whether the judgment was founded upon a contract or tort, with a view to determine whether or not an act of the legislature taking away the right of enforcing judgments against municipalities for torts was applicable to the case; but has no authority to re-examine the validity of the contract, if that was the basis of the judgment, or the propriety of the judgment, those questions having been finally adjudicated.

1 Outram v. Morewood, 3 East, 346.
2 Embury v. Conner, 3 Comst. 511.
3 98 U. S. 381.
4 68 Mo. 51.
5 The Mayor v. Lord, 9 Wall. 409.
6 Lincoln County Court v. United States, 105 U. S. 739.
7 Clews v. Lee County, 2 Woods, 475.
8 State v. Rainey, 74 Mo. 229; State v. Supervisors, 20 Wis. 79.
9 Supervisors v. United States, 4 Wall. 435.
10 111 U. S. 716.

In Louis v. Brown Township,[11] it is held that, when a proceeding in *mandamus* is used as an action at law to recover money, it is subject to the principles which govern money actions, and the established rules as to the conclusiveness of judgments are applicable.

When any legal liability has once been judicially ascertained, it will suffice, in a proceeding by *mandamus* to enforce it, to state that fact. The circumstances out of which it grew need not be stated; both the facts and the liability are *res adjudicata*.[12] County officers cannot defend against a writ of *mandamus* sued out to compel them to levy a tax to pay damages awarded in a proceeding to open a road, by showing that the proceeding is irregular.[13]

The principle which controls these cases is applied to all proceedings after judgment. Thus, "on motion to enter satisfaction of a probate decree, and to supersede an execution issued thereon, no matter can be brought forward which is antecedent to and involved in the decree."[14] Nor is it "competent for the court, upon exceptions, to make an order which is not consistent with the original decree. From the time of the pronunciation of that decree all subsequent proceedings should be consistent with it."[15] A verdict and judgment upon a question of fact on a plea in abatement in attachment are conclusive of the same question upon a trial on the merits.[16] Where a judgment for damages for deforcement of dower was presented to the probate court and assigned to the fifth class of allowed demands, and afterwards the administrator refused payment, *held* that, notwithstanding the judgment was not, under the statute, originally a general demand against the estate, yet the classification made it such, and operated as a *res adjudicata*.[17] In an action for mesne profits, after judgment in ejectment, the defendant is precluded from setting up any defense which he might have availed himself of in the ejectment.[18]

Upon execution nothing can be shown contradictory of the record of the judgment.[19] "It matters not under what form, whether by petition, exception, rule or intervention, the question is presented, whenever the same question recurs between same parties, the plea of *res judicata* estops.[20]

The doctrine of the principal case has often been applied where homestead or other exemptions are claimed. In Tadlock v. Eccles,[21] it is said that "there is nothing in the homestead right to exempt it from the operation of this general principle." Three Illinois cases well illustrate its application. In Wing v. Cropper,[22] there had been a decree *pro confesso* of foreclosure of a mortgage and a sale in pursuance of the decree by a master, on the incoming of whose report the defendant filed a motion to set aside the sale, claiming the mortgaged premises as his homestead. This claim was sustained, Breese, J., saying: "There is nothing alleged in the bill in this case about a home-

11 109 U. S. 162.
12 School District v. Lauderbaugh, 80 Mo. 190.
13 Huntington v. Smith, 25 Ind. 486.
14 Shackelford v. Cunningham, 41 Ala. 203.
15 Lang v. Brown, 21 Ala. 191; Daniel Chan. Prac. and Plead. 1499.
16 Stewart v. Nelson, 79 Mo. 522.
17 Brown v. Woody, 22 Mo. App. 523.
18 Baron v. Abeel, 3 Johns. 481.
19 Huffer v. Allen, L. R. 2 Ex. 15.
20 Sewell v. Scott, 35 La. Ann. 523.
21 20 Tex. 791. See also Miller v. Sherry, 2 Wall. 237; Lee v. Kingsbury, 18 Tex. 70; Larson v. Reynolds, 18 Iowa, 582; Wilson v. Stripe, 4 Greene (Iowa), 551.
22 35 Ill. 256.

stead. Of course, then, taking the bill *pro confesso* does not amount to a confession of any fact not alleged in it. By failing to answer, the defendants admit only what is alleged in the bill." In Asher v. Mitchell,[23] it is conceded by the court that if, in a suit for foreclosure of a mortgage, resulting in a decree of foreclosure, the homestead rights of the mortgagor are put in issue, the question cannot afterward be raised by the mortgagor in ejectment brought against him by the purchaser under the decree. In Goltra v. Green,[24] which was ejectment by the purchaser for land bought at sale under decree of foreclosure, the court said: "If the estate of homestead was one of the issues presented by the pleadings in the foreclosure case, and was passed upon by the court, the decree thus rendered is conclusive upon the Greens, who were parties to the chancery proceedings, so long as it remains unreversed, and that, too, regardless of the fact whether the decision was right or erroneous." The court then proceeded to examine the pleadings, and found that the homestead estate was fairly in issue in the foreclosure proceedings, and so held the decree conclusive against the exemption claimed, notwithstanding there was no express finding in the decree against it. The decision has been the same where land has been charged by decree with the payment of alimony,[25] or has been adjudged to be affected by a specific lien and ordered to be sold to satisfy the same,[26] and where a deed has been adjudged fraudulent as to creditors and the land has been decreed to be sold to satisfy their claims.[27] Whether property attached is or is not exempt from execution, is *res judicata* after judgment in attachment.[28]

A judgment is not the less conclusive because it is rendered upon default of the defendant.[29] While not admitting anything necessary to be proved upon the assessment of damages, such a judgmeut admits the cause of action as alleged in the petition.[30] In equity, when defendant fails to answer, the bill is taken *pro confesso*, the consequence of which is that every allegation in it is considered as confessed.[31] At least every distinct and positive allegation.[32] • •

[23] 92 Ill. 483. See also Patterson v. Wallace, 47 Ga. 452; Harris v. Colquit, 44 Ga. 663.

[24] 98 Ill. 332. See also Rector v. Ratton, 3 Neb. 178; Slaughter v. Detiney, 15 Ind. 49; Oleson v. Bullard, 40 Iowa, 9.

[25] Hemenway v. Wood, 43 Iowa, 21.

[26] Corpening v. Kincaid, 82 N. C. 202.

[27] Miller v. Sherry, 2 Wall. 237.

[28] Perkins v. Bragg, 29 Ind. 507.

[29] State v. Rainey, 74 Mo. 232; Green v. Hamilton, 16 Md. 329; Mailhouse v. Inloes. 18 Md. 333; Brown v. Mayor, 66 N. Y. 390; Jarvis v. Driggs, 69 N. Y. 143; Newton v. Hook, 48 N. Y. 676; Gates v. Preston, 41 N. Y. 113; White v. Merritt, 3 Seld. 355; Cromwell v. Sac County, 94 U. S. 356; Aslin v. Parker, 2 Burr. 665; Goodtitle v. Tombs, 3 Wils. 118.

[30] Burlington, etc. R. Co. v. Shaw, 5 Iowa, 463; Welch v. Wadsworth, 30 Conn. 149; Kiersted v. Rogers, 6 H. & J. 285; Briggs v. Richmond, 10 Pick. 391.

[31] Atty.-Gen. v. Carver, 12 Ired. 235; Luckett v. White, 10 Gill & J, 489.

[32] Atkins v. Faulkner, 11 Iowa, 326; Platt v. Judson, 3 Blackf. 235.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ADMINISTRATION—Compromise.——An agreement between an administratrix (widow) and the heirs of her intestate, by which she surrendered her dower, and in consideration thereof they released her from all liability to them either personally or in her representative capacity: *Held*, that this release operated to vest in her personally in fee simple the title to certain lands of the estate which she had previously bought in as administratrix,—*Jones v. Slaughter*, S. C. N. Car., June 14, 1887; 2 S. E. Rep. 651.

2. ANIMALS—Texas Cattle—Damages.——In an action for damages against one who drove Texas cattle into the State, from whom the Texas fever was communicated to other cattle, it must be alleged and proved that defendant should have known that these cattle were liable to communicate the disease to other cattle. Contributory negligence by the plaintiff is a competent defense.—*Patee v. Adams*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 505.

3. APPEAL—An objection that a married woman has, without giving security, taken an appeal which she was not entitled by law to take in that manner, cannot be made for the first time by assignment of error after such appeal has been taken.—*Johnson v. Ward*, S. C. Ala., July 24, 1887; 2 South. Rep. 524.

4. APPEAL—Assignment of Error.——An assignment of error, which does not sufficiently point out th e error complained of, cannot be considered on appeal.—*Mynders v. Ralston*, S. C. Tex., June 14, 1887; 4 S. W. R ep. 854.

5. APPEAL—Bond.——A bond for a suspensive appeal, furnished after the delay allowed by the statute had expired, is, nevertheless, sufficient to sustain a devolutive appeal.—*Succession of Keller*, S. C. La , May 23, 1887; 2 South. Rep. 553.

6. APPEAL—Bond—Injunction.—— In an action on an injunction and a forthcoming bond the appellee cannot urge that the elements of damage claimed on either of the bonds should be eliminated as fictitious, because no recovery could be had on either bond. That is begging the question, which is, in effect, whether such

recovery can be had or not.—*Lallande v. Trezevant*, S. C. La., June 20, 1887; 2 South. Rep. 573.

7. APPEAL—Decision—Written Opinions.——The law requiring a written opinion in every case on every point is repealed by the law requiring such opinions when new principles are settled, nor can the legislature make such demand.—*Vaughan v. Harp*, S. C. Ark., May 21, 1887; 4 S. W. Rep. 751.

8. APPEAL—Evidence — Objections.—— Objections to evidence, when no specific ground therefor is stated, will not be considered on appeal.—*Greer v. Redman*, S. C. Mo., June 20, 1887; 4 S. W. Rep. 745.

9. APPEAL—Jurisdiction—Garnishment.—— When, in an action, the only question is the liability of several distinct and separate garnishees, from each of whom is claimed a different amount, the test of jurisdiction as to the appealability of the case is not the amount claimed of the defendant, nor the aggregate of the demands against the garnishees collectively, but the amount of the several demands against the garnishees severally.—*State, etc. Bank v. Allen*, S. C. La., May 23, 1887; 2 South. Rep. 600.

10. APPEAL—Jurisdiction—Succession.——If the proceeds of a succession sale exceed $2,000, and the widow claims $1,000 under the statute, and her claim is contested by mortgage creditors, the case is appealable and the supreme court has jurisdiction.—*Succession of Cousley*, S. C. La., May 9, 1887; 2 South. Rep. 542.

11. APPEAL—New Trial—Dismissal.——Where a new trial is granted, upon which the plaintiff refuses to proceed therewith, and the cause is dismissed for want of prosecution, the plaintiff, having excepted to the granting of the new trial and having moved to set aside the dismissal, can appeal.—*Iron Mt. Bank v. Armstrong*, S. C. Mo., June 20, 1887; 4 S. W. Rep. 720.

12. APPEAL—Review — Objections. —— Where, in an ejectment case, the several defendants claimed that they severally occupied specific portions of the tract, and a judgment was rendered against each for the entire tract, on appeal from an order denying a new trial such alleged error cannot be considered, when in the motion for a new trial no specification was made of the insufficiency of the evidence on that point.—*Hancock v. Burton*, S. C. Cal., July 1, 1887; 14 Pac. Rep. 392.

13. APPEAL—Service of Notice. —— Mere mailing of the notice of appeal is not sufficient proof of its service. *Murdock v. Clarke*, S. C. Cal., June 30, 1887; 14 Pac. Rep. 385.

14. APPEARANCE—Authority—Jurisdiction.——An appearance for a party in a suit will be held valid until the contrary is proved, when the defendant will be relieved from all consequences therefrom. Every independent government prescribes the manner in which a party shall be notified of a suit against him, and such notification is as binding on him locally as though he was served by personal service.—*Mutual, etc. Co. v. Piner*, N. J. Ct. Ch., July 22, 1887; 10 Atl. Rep. 184.

15. ASSAULT AND BATTERY—Civil Action — Opprobious Words.——When, in a civil action, it appears that, in consequence of the defendant's using the words "that is not so," the plaintiff assaulted the defendant and was subsequently stabbed, the verdict for the defendant was correct and would not be disturbed, although the trial judge should have left to the jury the question whether the words of the defendant were opprobrious or not.—*Tucker v. Walters*, S. C. Ga., Feb. 28, 1887; 2 S. E. Rep. 689.

16. ASSAULT—Indictment.——An indictment alleging that the defendant committed an assault by "shooting at" the prosecutor, charges one of the four kinds of assault set forth in § 792, Rev. Stat. La. It is not necessary that such an indictment should state the intent with which such shooting was done.—*State v. Brady*, S. C. La., May 23, 1887; 2 South. Rep. 556.

17. ASSIGNMENT—For Creditors—Claims — Fraudulent Conveyance—Judgment.——A party whose claim has been allowed by an assignee for the benefit of creditors, under the Missouri law, no appeal therefrom having been taken, occupies in a court of equity, in an effort to impeach a conveyance of the assignor, as good a position as a judgment creditor, and if the deed is canceled the property should be sold and the proceeds applied first to paying such creditor.—*Roan v. Winn*, S. C. Mo., June 20, 1887; 4 S. W. Rep. 736.

18. ASSUMPSIT—Services—Value.——Where one performs services for another, to be paid in a particular way, upon a refusal so to pay, the party is entitled to their money value.—*Shane v. Smith*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 477.

19. ATTACHMENT—Dissolution—At Chambers — Affidavit.——A judge may hear and determine a motion to dissolve an attachment at chambers, when both parties appear and make no objection, though a judge *pro tem.* is then holding the court. An affidavit for an attachment, made before a notary, who is the plaintiff's attorney, is only voidable, and may be amended.—*Swearingin v. Howser*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 436.

20. ATTORNEY — Insolvency. —— An attorney employed by an insolvent to conduct the insolvency proceedings for a "cession" is entitled to compensation out of the insolvent's estate.—*Putnam v. Creditors*, S. C. La., May 9, 1887; 2 South. Rep. 543.

21. BANKRUPTCY—Discharge. —— A bankrupt, after obtaining his discharge, may have an entry of discharged, by virtue of the bankrupt law, entered against a judgment obtained against him after his voluntary petition in bankruptcy was filed, though the suit was brought before such filing, and though he took no part in the suit.—*Tefft v. Knox*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 441.

22. CERTIORARI—*Certiorari* can only be made available when it appears on the face of the record that the proceedings drawn into question are absolutely null and void.—*State ex rel. v. Koenig*, S. C. La., May 23, 1887; 2 South. Rep. 559.

23. CONTRACT—Gas Lights — Construction.——Where a company contracts with a city to keep all gas lamps on the streets lighted every night, except when the moon gives sufficient light, and it is provided that the city shall not be liable for rent for any lamp for any night when the lamps are not lighted, the city is not liable for such rent on moonlight nights when the lamps are not lighted.—*City of Winfield v. Winfield Gas Co.*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 499.

24. CONTRACTS—Monopolies—Constitutional Law.—— Where the State has ratified the grant of a monopoly by a city in supplying it with water by incorporating the grantee, which has expended money and is faithfully supplying the water under the contract, the State cannot charter another corporation and authorize it to appropriate by eminent domain any of the property or water rights of the first corporation.—*Citizens' Water Co. v. Bridgeport H. Co.*, S. C. Conn., Feb. 25, 1887; 10 Atl. Rep. 170.

25. CORPORATION — Municipal—Tax-payers—Taxation. ——Tax-payers have a standing in court to contest the validity of a municipal ordinance and of a contract made under it, when the enforcement of such ordinance, or the execution of such contract, would tend to increase the burden of taxation.—*Conery v. New Orleans, etc. R. Co.*, S. C. La., May 23, 1887; 2 South. Rep. 555.

26. COSTS—Municipal Ordinances—State Laws.——A municipal ordinance making the costs a part of the fine, which can be discharged at fifty cents a day, is not inconsistent with the State law, making the laws of costs not penal and providing that a defendant can be imprisoned for not paying his fine, his term of imprisonment not to exceed one day for each two dollars of his fine.—*Berry v. Brislaw*, Ky. Ct. App., June 7, 1887; 4 S. W. Rep. 794.

27. COURTS—Vacation ——Construction of Alabama rule of chancery practice, which provides that if a cause is submitted during term time for a decree or order, such decree or order may be entered during a subsequent vacation. Such order or decree so entered will be taken as if made by consent of parties or their

counsel.—*Shine v. Bolling*, S. C. Ala., July 13, 1887; 2 South. Rep. 533.

28. CRIMINAL LAW—Abortion—Burden of Proof.——Under an indictment for manslaughter by producing an abortion not necessary to save the life of the mother, the State must prove that the abortion was not necessary to preserve her life.—*State v. Clements*, S. C. Oreg., June 13, 1887; 14 Pac. Rep. 410.

29. CRIMINAL LAW — Accomplice—Evidence.——In a murder trial, one jointly indicted with others, but as to whom a *nolle prosequi* has been entered, can testify for the State.—*State v. Chyo Goom*, S. C. Mo., June 20, 1887; 4 S. W. Rep. 712.

30. CRIMINAL LAW—Accomplice—Testimony—Wrongful Arrest.——One jointly indicted with others cannot testify for the State, unless his case has been ended by a conviction, acquittal or *nolle prosequi*, though he is not put on his trial; but he can testify for the defendants. A wrongful arrest and detention does not impair the validity of an indictment subsequently found.—*State v. Chyo v. Chiagk*, S. C. Mo., June 20, 1887; 4 S. W. Rep. 704.

31. CRIMINAL LAW — Appeal—Record.——On appeal, the testimony of jurors on their *voir dire*, the testimony in the case and the instructions refused, can only become a part of the record by being embodied in the bill of exceptions.—*State v. McClintock*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 511.

32. CRIMINAL LAW—Assault—Definition.——In Arkansas, an assault is an unlawful attempt, coupled with present ability, to commit a violent injury on another. An instruction adding the idea of an apparent ability is erroneous.—*Pratt v. State*, S. C. Ark., May 28, 1887; 4 S. W. Rep. 785.

33. CRIMINAL LAW — Assault to Murder—Indictment. ——A charge, that the accused did then and there make an assault upon A, with intent to murder him, the said A sufficiently charges an assault to murder.—*Gordon v. State*, Tex. Ct. App., March 16, 1887; 4 S. W. Rep. 883.

34. CRIMINAL LAW—Homicide—Admissions—New Trial —Reversal.——A witness can testify that defendant while drunk threatened to kill the deceased. The action of the trial court in passing on a motion for a new trial on the ground of newly-discovered evidence, is not subject to revision. A conviction in Kentucky can only be reversed on appeal for errors of law, and not for lack of evidence.—*Smith v. Com.*, Ky. Ct. App., June 2, 1887; 4 S. W. Rep. 798.

35. CRIMINAL LAW—Homicide—Self-defense.——If the defendant, at the time of the killing, had reasonable ground to believe, and did believe, that the deceased sought him for the purpose of killing him or of doing him great bodily harm, and was then manifesting an attack on him, he was not bound to retreat, but might defend himself to the extent of taking deceased's life. —*Marcum v. Com.*, Ky. Ct. App., June 2, 1887; 4 S. W. Rep. 786.

36. CRIMINAL LAW — Homicide — Self-defense—Dwelling-house.——If one believes, and has reasonable grounds to believe, that another is about to take his life, or to inflict great bodily harm on him, in his own dwelling-house, he has a right to protect himself then and there by using all necessary means, even to killing the assailant.—*Estep v. Com.*, Ky. Ct. App., June 16, 1887; 4 S. W. Rep. 820.

37. CRIMINAL LAW—Indictment — Robbing — Larceny. ——In Arkansas, by statute, one indicted for robbery may be convicted of larceny. If the property is voluntarily delivered there can be no larceny.—*Haley v. State*, S. C. Ark., May 21, 1887; 4 S. W. Rep. 746.

38. CRIMINAL LAW—Information—Date—Variance.—— A variance as to the date of the alleged offense between the affidavit and the information based on it is fatal.—*Huff v. State*, Tex. Ct. App., April 16, 1887; 4 S. W. Rep. 890.

39. CRIMINAL LAW—Instructions — Issues.——A verdict will not be disturbed on appeal because the court refused to give instructions asked by the defendant, when they are substantially embraced in those given.—*State v. Hicks*, S. C. Mo., June 6, 1887; 4 S. W. Rep. 742.

40. CRIMINAL LAW—Jury — Re-examination — Newspapers. ——A motion to re-examine the panel of jurors, after they have qualified, and the defendant has been allowed forty-eight hours to make his peremptory challenges, made on the day of trial, four days thereafter, to ascertain if they have in the meantime become disqualified by reading certain papers, is properly denied, in the absence of evidence that the jury have disregarded the judge's caution.—*State v. Rose*, S. C. Mo., June 6, 1887; 4 S. W. Rep. 733.

41. CRIMINAL LAW—Mill—Burglary.——For breaking into a mill-house in the night time, wherein corn, flour and meal are stored for sale, the defendant cannot be convicted of burglary.—*Daniels v. Com.*, Ky. Ct. App., June 16, 1887; 4 S. W. Rep. 812.

42. CRIMINAL LAW—Murder—Admissions—Confessions — Actions. ——Upon a trial for murder, statements made by the accused before a grand jury, which indicted another for the crime, are admissible; so is his evidence when testifying against his accomplice on a promise, that he would not be prosecuted if he told everything, when he has failed to keep his agreement. Evidence, that the accused took money from the pockets of the deceased two and one half hours after he was poisoned, is admissible.—*State v. Moran*, S. C. Oreg., June 14, 1887; 14 Pac. Rep. 419.

43. CRIMINAL LAW — Murder — Indictment. ——An indictment for murder, which states the name of the person killed, need not state that he was a reasonable creature in being.—*Wade v. State*, Tex. Ct. App., April 23, 1887; 4 S. W. Rep. 896.

44. CRIMINAL PRACTICE.——Upon an appeal taken by the State from a judgment quashing an indictment, rulings made in favor of the State cannot be discussed, because the defendant, not having been tried, cannot appeal from such rulings.—*State v. Bubois*, S. C. La., May 23, 1887; 2 South. Rep. 558.

45. CRIMINAL PRACTICE — Argument — Time.——The spirit of the Connecticut statute allows each party in a criminal case two hours for the argument, and where the full time was not allowed in a prosecution for murder in the second degree, the case was remanded.—*State v. Nyman*, S. C. Conn., Nov. 30, 1886; 10 Atl. Rep. 161.

46. CRIMINAL PRACTICE—Futile Appeal.——An appeal is futile which is taken by the State from an order which quashed a *venire* because the term of the court from which the *venire* issued was illegal. There is nothing upon which a judgment on such an appeal could operate.—*State v. Segura*, S. C. La., May 23, 1887; 2 South. Rep. 552.

47. CRIMINAL PRACTICE — Indictment. ——When, in one transaction, a person commits two crimes, each sustainable by its own evidence, independent of the proof requisite to sustain the other charge, an indictment will lie for each, and a conviction of one of the crimes will not bar a prosecution for the other.—*State v. Faulkner*, S. C. La., June 14, 1887; 2 South. Rep. 539.

48. CRIMINAL PRACTICE — Verdict — Autrefois Acquit. ——Where the jury, in a grand larceny case, bring in a verdict of petty larceny, when the judge charges them again and sends them out, and on their failure to agree discharge them, the defendant, at a subsequent trial, cannot plead *autrefois acquit*.—*McRae v. State*, S. C. Ark., June 4, 1887; 4 S. W. Rep. 758.

49. DAMAGES — Venue — Railroad — Speed. ——Suits against railroads for damages may be brought in the parish (county) in which the damage accrued. A railroad train may, in the absence of regulating statute, be run at the highest rate of speed consistent with the safety of the passengers.—*Houston v. Vicksburg, etc. Co.*, S. C. La., June 18, 1887; 2 South. Rep. 562.

50. DAMAGES—Sale of Goods—Breach of Contract.—— For breach of contract in not receiving and paying for goods, the damages are the difference between the contract and the market prices, and the cost of manufact-

ure is presumably the market value.—*Geiss v. Wyeth, etc. Co.*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 463.

51. DEATH—By Wrongful Act—Survival of Action.——Under the statute law of Mississippi, the personal representative of one who has been killed by the wrongful act of another is entitled to recover damages for such death. The right of action survives.—*Vicksburg, etc. Co. v. Philips*, S. C. Miss., May 2, 1887; 2 South. Rep. 537.

52. DEDICATION—Presumption.——In a lease of lands to a city, references to other streets than that ceded, does not create a conclusive presumption that those other streets are also dedicated to public uses. Such presumption may be rebutted.—*Mayor, etc. v. Glenn*, Md. Ct. App., June 22, 1887; 10 Atl. Rep. 70.

53. DEED—Boundary—Water—Island — Adverse Possession.——A call in a deed to run "to the water, thence with the water," etc., conveys title to low-water mark. An island of rocks and ledges may be the subject of title by adverse possession.—*Babson v. Tainter*, S. J. C. Me., April 14, 1887; 10 Atl. Rep. 63.

54. DEED—Description—Identification.——Where the land described in a sheriff's deed can only be identified by reference to a map, and there are two maps equally answering the description, neither which has been filed with the county recorder, the sheriff cannot testify as to which map he referred.—*Cadwalader v. Nash*, S. C. Cal., July 1, 1887; 14 Pac. Rep. 385.

55. DIVORCE—Alimony—Discretion.——An order ordering a payment of counsel fees and costs on account of alimony in a divorce suit will not be interfered with, unless a gross abuse of discretion by the court affirmatively appears.—*White v. White*, S. C. Cal., July 7, 1887; 14 Pac. Rep. 393.

56. DIVORCE—Decree—Setting Aside.——A petition to set aside a decree of divorce obtained at a prior term of the court is prohibited by statute.—*Salisbury v. Salisbury*, S. C. Mo., June 20, 1887; 4 S. W. Rep. 717.

57. DIVORCE — Reversal — Alimony. —— Though the court of appeals has no power to reverse a decree of divorce, yet it may reverse it to send it back for a proper allowance of alimony to the wife, when she was not in fault and the decree ought to have been for her.—*Davis v. Davis*, Ky. Ct. App., June 16, 1887; 4 S. W. Rep. 822.

58. DIVORCE—Sentence for Support.—— A sentence by a court that a husband shall pay for the support of his wife and child is no bar to a divorce sought by him on the ground of desertion by the wife persisted in for more than two years.—*Bander's Appeal*, S. C. Penn., March 14, 1887; 10 Atl. Rep. 41.

59. ELECTIONS—Bonus—County-seat.——An offer to build a jail and court house in a town if the county-seat is moved there does not invalidate an election at which the change is made.—*Neal v. Shinn*, S. C. Ark., June 4, 1887; 4 S. W. Rep. 771.

60. ELECTIONS — Evidence — Poll-books and Tally-sheets.——Though the poll-books and tally-sheets are the best evidence of the result of an election, yet if these have disappeared, the judges and clerks may testify as to the votes given, or even spectators, or the voters may testify as to their votes, but cannot be required to do so.—*Dixon v. Orr*, S. C. Ark., June 11, 1887; 4 S. W. Rep. 774.

61. EMINENT DOMAIN—Damages—Evidence.—— When, in a suit to determine the damage done to property by putting down a track in an alley on August 1, witnesses, who knew the market value of abutting property on or about said August 1, can testify as to the value of said property, both before and immediately after the laying down of said track.—*Central Branch, etc. R. Co. v. Andrews*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 509.

62. EQUITY — Quieting Title — Common Source—Life Tenant—Limitation of Actions.——Where, in an action to quiet title, it appears that both parties claim under a will, the defendant cannot impeach it. The statute of limitations does not apply in a suit brought by remaindermen to quiet their title against the tenant for life, who claims the fee.—*Keller v. Stanley*, Ky. Ct. App., June 7, 1887; 4 S. W. Rep. 807.

63. EQUITY — Quieting Title — Defendants.——Under Kentucky law, one having the legal title and the possession may bring an action to quiet his title to the land against parties claiming adverse interests. He may join all such parties in the suit, though they claim different parcels of it and under distinct rights.—*Kincaid v. McGowan*, Ky. Ct. App., May 31, 1887; 4 S. W. Rep. 802.

64. ESTOPPEL—Advice—Promise.——In the absence of any fraudulent intent or concealment, advice to buy land with a promise not to buy it himself, the adviser being known to have no title, does not estop the adviser from purchasing it, though the other party has made improvements thereon.—*McLean v. Buliner*, S. C. Ark., June 4, 1887; 4 S. W. Rep. 768.

65. ESTOPPEL—Community Property—Contract—Time—Waiver.——Where the husband agrees with lessees to extend the lease made by his wife and the other owners of the land, and the lessees go on and expend money, and the property proves to be community property, the wife is bound by such action.—*Presidio Min. Co. v. Bullis*, S. C. Tex., June 25, 1887; 4 S. W. Rep. 860.

66. EVIDENCE—Records—Secondary.——A report of the convictions in his court, required by law to be filed in the clerk's office by a justice of the peace, are not admissible evidence of the conviction of a witness of larceny before him. His docket or a certified copy must be produced.—*Scott v. State*, S. C. Ark., May 21, 1887; 4 S. W. Rep. 750.

67. EVIDENCE — Tax Lists.——The tax lists of the county in which land is situated are competent evidence in an action involving the title to the land. Thus, the fact that the lists show that when the title was not in controversy A listed the lands for taxes as his up to a certain period, and that after that period B listed the land as his. Evidence of these facts is competent to show the claims of the parties to the action.—*Austin v. King*, S. C. N. Car., June 9, 1887; 2 S. E. Rep. 678.

68. EVIDENCE—Value of Services—Opinion.——A jury is not bound to accept the opinions given by attorneys as to the value of legal services. They may consider those opinions in connection with other testimony in the case and their own general knowledge, and determine the value for themselves.—*Bentley v. Brown*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 434.

69. EXECUTORS AND ADMINISTRATORS—Action—Limitations—Statute.—— In Maine, a creditor may sue an administrator at any time within two years and six months after notice has been given of the appointment of the administrator, and this without presentation and demand of payment. If, in an action on an account, some of the items set forth in the declaration appear to have accrued within six years, though others do not, the action is not barred by the statute, "upon the face of the papers."—*Gould v. Whitmore*, S. J. C. Me., May 28, 1887; 10 Atl. Rep. 60.

70. EXECUTOR—Care of Estate—Negligence.——Where an executor fails to foreclose a mortgage secured by a note, of which the maker is insolvent, and the mortgaged property depreciates in value, and the executor pays taxes, he is chargeable to the estate for the depreciation and for the taxes paid, but he is not chargeable for the whole debt, though the note has become outlawed, for the mortgage still continues unless barred by adverse possession.—*Booker v. Armstrong*, S. C. Mo., June 20, 1887; 1 S. W. Rep. 727.

71. EXECUTORS—Compounding Debts—Liability.—— An administrator may compound debts due the estate in Arkansas without consulting the probate court, but he assumes the burden of proving, if called to account, that he acted judiciously.—*Wilkes v. Black*, S. C. Ark., June 11, 1887; 4 S. W. Rep. 766.

72. EXECUTORS—Lien.——If creditors of an estate agree with the executors that the sale of real estate be postponed, and it is postponed for more than five years, but nothing is agreed upon about their lien, it cannot be extended beyond the period of five years af-

ter the death of the decedent as proved by statute.—*Welsh's Appeal*, S. C. Penn., March 14, 1887; 10 Atl. Rep. 84.

73. EXECUTORS —Judgment—Grantees.——In a proceeding to subject land conveyed by the deceased to his wife for love and affection to a judgment obtained against his administrator, the wife is concluded by the judgment, but may disprove the fact of indebtedness.—*Hobbs v. McMakin*, Ky. Ct. App., June 4, 1887; 4 S. W. Rep. 793.

74. FRAUD—Principal and Agent—Remedies.——Where A gives his stock in a mine to B, in order that he may effect a sale of the mine, which he does, but he retains the stock and pays A but a small amount, A may sue B for an accounting and for a return of the stock, without a previous demand for the stock and without a tender of the money received.—*Wooster v. Nevills*, S. C. Cal., July 1, 1887; 14 Pac. Rep. 390.

75. FRAUDULENT CONVEYANCE —Conduct — Presumption. —— Where an insolvent conveyed land to a trustee for the benefit of his wife and children, and then sold it to his brother, a man of ample means, who held it as his own for twenty-seven years, when the heirs of the vendor and also those of the trustee, brought suit for it, it was held that it was a conclusive presumption that all parties regarded the trust deed as void.—*Bates v. Bates*, Ky. Ct. App., June 9, 1887; 4 S. W. Rep. 812.

76. FRAUDULENT CONVEYANCE—Judgment—Pleadings. ——Real estate conveyed before a judgment cannot be subjected to it, unless it is alleged and proved that it was conveyed to prevent the enforcement of the judgment against it.—*Van Vliet v. Halsey*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 482.

77. FRAUDULENT CONVEYANCE — Partnership — Individual Debt.——A partnership creditor cannot impeach as fraudulent in law a conveyance to accrue an individual debt of the partners when there is no fraud in fact.—*Cawer G. & M. Co. v. Bannon*, S. C. Tenn., May 17, 1887; 4 S. W. Rep. 831.

78. FRAUDULENT CONVEYANCES — Recovery — Value. ——Where the property conveyed in fraud of creditors to one, participating in the fraud, cannot be recovered, its money value may be.—*Solinsky v. Lincoln S. Bank*, S. C. Tenn., 1887; 4 S. W. Rep. 836.

79. FRAUDS — Statute of — Letters to Agent. ——A vendee, who has verbally accepted the terms offered, may prove the contract by the letters of the principal to his agent.—*Lee v. Cherry*, S. C. Tenn., May 4, 1887; 4 S. W. Rep. 835.

80. GAMING—Options—Notes—Bona Fide Holder.—— A contract for the delivery of goods in the future is valid, though there is an option as to the time of delivery. If the intention is not to deliver anything, but to speculate in the use and fall of prices, it is void, and the burden of proof is on him so alleging. A note given to brokers to protect them in such wagering contracts then pending and thereafter to be made, is good in the hands of a *bona fide* holder without notice before maturity.—*Crawford v. Spencer*, S. C. Mo., June 20, 1887; 4 S. W. Rep. 713.

81. GARNISHMENT — Answer — Estoppel.——When A, garnished by B as a debtor of C, answers that he owes C on certain conditions to be performed by C, and judgment goes against him for the amount due B from C, he is not estopped thereby in the suit of B against him on said order from showing that he owes nothing to C, because C has not fulfilled those conditions.—*Linder v. Murdy*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 447.

82. GARNISHMENT — Notice — Attorney. ——Where a garnishee admits that he owes the price of goods, but states in his answer that the bill was presented by the son of the defendant, and no notice for judgment is served except upon an attorney who disclaims all connection with the case, the son, being the owner of the goods sold, can recover the price from the garnishee, even after he has paid the judgment rendered against him on his answer.—*Gener v. Dieterle*, S. C. Penn., Feb. 28, 1887; 10 Atl. Rep. 43.

83. GUARDIAN AND WARD—Sale of Realty—Breach of Bond—Damages.——Where a guardian reports a sale of his ward's land, but in reality received in trade other lands, which are subsequently conveyed to the ward and sold by him at a loss, the measure of damages is the cash reported to have been received at the alleged sale by the guardian with interest, less the money actually received by the ward with interest.—*State v. Weaver*, S. C. Mo., June 20, 1887; 4 S. W. Rep. 697.

84. HABEAS CORPUS—Errors—Review.——*Habeas corpus* is not intended to review the regularity of the proceedings in any case, and if the indictment discloses facts sufficient to base a charge of any offense, the prisoner should not be discharged.—*In re Kowalsky*, S. C. Cal., July 12, 1887; 14 Pac. Rep. 399.

85. HIGHWAYS — Abutter — Street Railway. ——An abutter cannot maintain an action of trespass against a street railway for using the street with its cars if it has a license to do so from the proper municipal authorities, nor for changing the grade of the street, nor for using steam as a motor, if the power to do this is vested by law in the municipal corporation.—*Briggs v. Lewiston*, S. J. C. Me., April 14, 1887; 10 Atl. Rep. 47.

86. HIGHWAYS—Report—Approval.——The report of commissioners to lay out a public road should be approved or disapproved by the court, and it is error to accept the road as opened to a certain point and reserve the remainder for further consideration.—*In re Public Road, etc.*, S. C. Penn., March 21, 1887; 10 Atl. Rep. 35.

87. HUSBAND AND WIFE—Separate Estate — Mortgage ——When a wife, when the mortgagee under a mortgage of her chattels made by her husband, when the mortgagee takes possession, protests, she is not estopped because she did not so inform the mortgagee when she first learned the fact.—*Taylor v. Riley*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 476.

88. HUSBAND AND WIFE — Semilation. ——When a husband, before marriage, has conveyed immovable property to his intended wife, he cannot, after marriage and separation, have such conveyance set aside as "simulated," nor can he by conveyance to a third person enable such third person to do so.—*Hawthorne v. Clark*, S. C. La., May 23, 1887; 2 South. Rep. 561.

89. INSOLVENCY—Discharge.——The order of a court in Louisiana, awarding a discharge to an insolvent debtor, is equivalent to homologating the *proces verbal* of the creditors' meeting called in pursuance of the statute, the summons to such a meeting is not a technical citation.—*Mohr v. Marks*, S. C. La., May 5, 1887; 2 South. Rep. 540.

90. INSOLVENCY—Discharge. ——Under Maine insolvency laws, a discharge granted upon composition proceedings is invalid, if there is any false statement contained in the affidavit or schedule prescribed by the law, and such discharge is no bar to the recovery of a judgment against the insolvent.—*Thaxter v. Johnson*, S. J. C. Me., April 14, 1887; 10 Atl. Rep. 46.

91. INTOXICATING LIQUORS—Bond—Breach.——Under the Connecticut law, a conviction of the violation of the liquor law is evidence of the breach of the bond given by a liquor seller in a civil suit on the bond.—*Welch v. McKane*, S. C. Conn., Feb. 4, 1887; 10 Atl. Rep. 168.

92. INTOXICATING LIQUORS—Fine—Lessor's Liability.—To enforce a lien for the fine and costs adjudged against a tenant for the sale of intoxicating liquors, against the owner of the premises, it is enough to allege and prove that the owner knowingly permitted the premises to be used for such purposes, and knowledge on his part sufficient to excite the suspicions of a prudent man is sufficient.—*Cordes v. State*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 493.

93. INTOXICATING LIQUORS — Indictment.——One indicted for selling intoxicating liquors contrary to the law is not entitled to any more precise and specific statement of the acts charged against him in the indictment than he would be if charged with an offense at common law.—*State v. Wooley*, S. C. Vt., July 5, 1887; 10 Atl. Rep. 84.

94. INTOXICATIGG LIQUORS—Local Option Law—When Operative.——The local option law does not go into operation until the order of court declaring the result of the election has been published for twenty-eight days from the day of its first publication.—*Phillips v. State*, Tex. Ct. App., April 20, 1887; 4 S. W. Rep. 983.

95. INSURANCE—Life—Contract—Will. —— Where, by the contract, the benefit of a co-operative insurance is payable to the wife, who dies before the insured, and he undertakes to dispose of the insurance by will, the heirs of the wife will inherit notwithstanding.—*Olmstead v. Masonic, etc. Society*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 449.

96. JUDGMENT—Default — Premature.——A judgment taken after notice by publication, but before the defendant was required to answer, is not void, but irregular, and is not subject to collateral attack.—*Mitchell v. Aten*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 497.

97. JUDGMENT — Collateral Attack — Justice of the Peace.——A judgment rendered by a justice cannot stand against a collateral attack, unless the record shows affirmatively that a summons was duly issued and served upon the defendant.—*Fahey v. Mottu*, Md. Ct. App., June 21, 1887; 10 Atl. Rep. 68.

98. JUDGMENT—Justices of the Peace—Revival.—— The provisions in the civil code for the revival of judgments apply to judgments of justices of the peace which have not been transferred to the district court.—*Israel v. Nichols*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 438.

99. JUDGMENT—Opening—Record.—— Where, on appeal from the opening of a judgment, the petition shows only the entries upon the journal of the district court, showing when the court finally acted, in opening the judgment it cannot be held the petition therefor came too late, when such entry states that the defendant gave due and legal notice of his intention, and also recites that three years had not elapsed from the judgment.—*Sperring v. Hudson*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 489.

100. JUDGMENT—Rule to Open—Estoppel.——If, upon a rule to open a judgment, plaintiff avers in his answer to the rule that two of the defendants were sureties, he cannot be permitted to show subsequently that one or both of them were joint borrowers.—*Fyan v. Cessna*, S. C. Penn., May 28, 1887; 10 Atl. Rep. 29.

101. JUROR—Capital Punishment,—— One who says that he would not hang a man on circumstantial evidence, but favor penitentiary punishment in such cases, is subject to challenge for cause by the State.—*Patton v. State*, S. C. Ala., June 30, 1887; 2 South. Rep. 531.

102. JURY—Challenge — Criminal Practice. —— There cannot be allowed a peremptory challenge after the opposite party has accepted the juror. A trial judge must not state, even hypothetically, matters of fact in his charge to the jury, if such statement is likely to mislead the jury.—*State v. Duer*, S. C. La., May 9, 1887; 2 South. Rep. 546.

103. JUSTICE—Summons—Service.——A summons in an action before a justice of the peace, served October 31, to appear November 3, is served in time. To contest such service the proper motion is to set it aside.—*Foster v. Markland*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 452.

104. LACHES—Probate Practice.——Where an auditor was appointed by a probate court to settle an estate in 1865, and awarded the estate to a claimant, but did not file his report until 1884. After the court had awarded the estate to the claimant a second claimant was held to have been guilty of laches and not entitled to relief.—*Appeal of Fidelity, etc. Co.*, S. C. Penn., Feb. 7, 1887; 10 Atl. Rep. 37.

105. LANDLORD AND TENANT—One who as a tenant under one whose title is imperfect, enters upon the land and sows crops after notification by the true owner that his landlord's title is lost, is liable to the true owner for the value of the crops so sown by him.—*Schmidt v. Williams*, S. C. Iowa, June 30, 1887; 33 N. W. Rep. 693.

106. LIENS—Advances—Statute. —— Construction of Alabama statute giving priority to liens for advances made on crops over all other liens except that of the landlord for rent.—*Boyett v. Potter*, S. C. Ala., July 20, 1887; 2 South. Rep. 534.

107. LIMITATIONS—Dismissal—Time.—— Where a suit was dismissed on appeal in the supreme court because it exceeded the jurisdiction of the justice: *Held* that, if it was brought in the circuit court within one year after its dismissal, but more than one year after the cause of action accrued, it was not barred.—*Little Rock, etc. R. Co. v. Maners*, S. C. Ark. June 18, 1887; 4 S. W. Rep. 778.

108. LIMITATIONS—Actions—Principal and Agent—Accounting—Evidence—Deceased.—— Where the transactions between principal and agent are continuous and no accounting has been had, the statute of limitations does not run. Where, in an action to set aside a conveyance, made to one now deceased, on the ground of undue influence, where witnesses for the defendant have testified that the plaintiff executed the deed freely and voluntarily, the plaintiff can testify to the contrary.—*McHany v. Irvin's Ex.*, Ky. Ct. App., June 9, 1887; 4 S. W. Rep. 800.

109. MASTER AND SERVANT—Negligence—Fellow-servant.——When a servant is injured by falling rock while engaged in learning the result of a blast, at the direction of the foreman, the master is not liable.—*Stephens v. Doe*, S. C. Cal., June 30, 1887; 14 Pac. Rep. 378.

110. MECHANIC'S LIEN—Railroad—Contractor's Bond. ——Under Kansas laws, laborers, mechanics and material men, in the construction of a railroad, for everything furnished by them which goes into the construction of the railroad, may sue on the contractor's bond, if he has given one; otherwise may sue the railroad, whether they contract with the contractor, subcontractor or sub-subcontractor, but a merchant has no lien on account of goods to be used to pay the wages of laborers,—*Parkinson v. Alexander*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 466.

111. MECHANIC'S LIEN—Signing — Filing. —— A mechanic's lien for a partnership is sufficiently verified by a member of the firm, and his affidavit immediately following the statement is sufficient, though he fails to sign the statement. A filing in the office of the clerk of the district court is then sufficient.—*Deatherage v. Woods*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 474.

112. MINES—Placers—Location.——A lode in a belt of mineralized rock lying within boundaries clearly separates it from the neighboring rock. Placers include all deposits excepting veins of quartz or other rock in place. A placer may be located without a previous discovery of mineral thereon.—*Gregory v. Pershbaker*, S. C. Cal., July 12, 1887; 14 Pac. Rep. 401.

113. MORTGAGES — Chattel — Oral — Delivery. ——An agreement, not in writing, to convey personal property as security, may be considered an oral mortgage, and will be held valid between the parties, or between parties having no greater or different rights, though no delivery of the property be made.—*Bates v. Wiggan*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 442.

114. MORTGAGE—Redemption—Junior Mortgagee.—— Construction of Iowa statutes, relating to the redemption by junior mortgages of lands sold under foreclosure of senior mortgage. What is the proper course if the junior mortgagee is not willing to credit the whole amount of his debt.—*West v. Fitzgerald*, S. C. Iowa, June 30, 1887; 33 N. W. Rep. 688.

115. MUNICIPAL CORPORATIONS—Acts—Approval.—— Where the city charter requires the mayor to approve of every vote, resolution, order, etc., of the city council, to render it operative, the mayor's approval must be in writing.—*New York, etc. R. Co. v. City of Waterbury*, S. C. Conn., Jan. 26, 1887; 10 Atl. Rep. 162.

116. MUNICIPAL CORPORATIONS—Ordinances — Crimes. ——The ordinance of the city of Stockton, about frequenting opium joints, is void, as conflicting with the State law.—*In re Sic*, S. C. Cal., July 14, 1887; 14 Pac. Rep. 405.

117. MUNICIPAL CORPORATIONS—Sidewalks—Ordinance. ——The Arkansas law, allowing municipal corpora-

tions to require property owners to build and maintain sidewalks, and to enforce such ordinances by fine, is constitutional, but it must cover the locality where the necessity exists and must not be oppressive.—*James v. City of Pine Bluff*, S. C. Ark., June 4, 1887; 4 S. W. Rep. 760.

118. MUNICIPAL CORPORATIONS—Streets—Assessments. ——Where, by act of the legislature, a municipal corporation can levy an assessment for street improvements, such assessment will not be set aside because the commissioner did not allow damages to the relator in the case. His remedy is by *mandamus*.—*State ex rel. v. City of Brunswick*, S. C. N. J., June 22, 1887; 10 Atl. Rep. 100.

119. NEGLIGENCE — Carriers — Passengers — Freight Trains.——The fact that the party injured was riding at the time on a freight train contrary to the rules of the company, does not make him any the less a passenger, if he was ignorant of the rules and took the train under the instructions of an agent of the company, whose duty it was to direct passengers.—*McGee v. Missouri, etc. R. Co.*, S. C. Mo., June 6, 1887; 4 S. W. Rep. 739.

120. NEGLIGENCE — Contributory — Alighting from Train.——A passenger who alights, while the train is moving slowly, at the orders of the conductor, no danger being apparent, is not guilty of contributory negligence, when the train did not stop long enough to enable him to alight.—*St. Louis, etc. R. Co. v. Person*, S. C. Ark., June 4, 1887; 4 S. W. Rep. 755.

121. NEGLIGENCE—Damnum Absque Injuria.——If a party is bound to keep up a dam, and it is broken by an ordinary storm, he is liable to the party injured for damages; but if it be broken by an extraordinary storm it is *damnum absque injuria*.—*Myers v. Futz*, S. C. Penn., May 30, 1887; 10 Atl. Rep. 30.

122. NEGLIGENCE—Death—Damages.——In an action for damages for the death of a minor, the jury can form an estimate of the pecuniary injury, present or prospective, resulting to the next of kin, from the facts proved, by their own knowledge and experience as men of the world, and it is not necessary for any witness to express an opinion thereon.—*Union, etc. R. Co. v. Dunden*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 501.

123. NEGLIGENCE — Injury — Examination of Person. ——In an action for damages for personal injuries against a railroad, the court in its discretion in a proper case may order a personal examination of the plaintiff to be made.—*Sidekum v. Wabash, etc. R. Co.*, S. C. Mo., June 20, 1887; 4 S. W. Rep. 701.

124. NEGLIGENCE—Railroads.——It is the duty of a railroad company to furnish all conveniences necessary to the safety of its passengers, including information how to reach the desired coach. A railroad is responsible if a passenger is injured by falling from a defective and badly lighted platform in seeking to reach the sleeping car.—*Moses v. Louisville, etc. R. Co.*, S. C. La., May 23, 1887, 2 South. Rep. 567.

125. NUISANCE — Saw-mill — Dwelling.——A saw-mill situated twenty-one feet from a dwelling-house, which is so operated that the dwelling is continually jarred, writing or conversation is carried on with difficulty, and the house is filled with dust and cinders when the windows are opened, is a nuisance, though other manufacturing establishments are one thousand feet away, and the neighborhood is largely occupied by tenement houses.—*Hurlbut v. McKone*, S. C. Conn., Feb. 4, 1887; 10 Atl. Rep. 164.

126. OFFICERS—Fees—Agreement.——In Michigan, a constable cannot recover on a *quantum meruit* for services rendered officially. — *Andrews v. Wilcoxson*, S. C. Mich., June 23, 1887; 33 N. W. Rep. 533.

127. OFFICERS—Fees—Agreement—Public Policy.—— A contract by a justice of the peace to charge smaller fees than are allowed by law in suits brought before him by a certain corporation, and not to collect them unless they have been paid over to the corporation by the defendants, is against public policy.—*Hawkeye Ins. Co. v. Brainard*, S. C. Iowa, June 22, 1887; 33 N. W. Rep. 603.

128. PARTITION—Sale.——If a partition in kind cannot be effected without serious loss to some one or more of the coparceners, the property must be sold at public auction in order that a partition of the proceeds may be effected.—*Blakemore v. Blakemore*, S. C. La., June 18, 1887; 2 South. Rep. 565.

129. PARTNERSHIP — Accounting. —— Circumstances stated under which an accounting had between a surviving partner and the administrator of the deceased partner will not be sustained.— *Morrisen v. Farrington*, N. J. Ct. Chan., June 24, 1887; 10 Atl. Rep. 105.

130. PARTNERSHIP — Articles—Dissolution.——Where the articles of partnership provide that it shall continue until dissolved as the law provides, either partner may dissolve it at his pleasure.—*Koenig v. Adams*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 439.

131. PARTNERSHIP—Silent Partner—Notes of Firm.—— A silent partner of a firm is liable on a note given by the firm, though it has been taken up and a new note given therefor by the firm after his retiracy, unless the new note was taken in payment of the old, the name of the firm remaining the same all the time.—*First Nat. Bk. v. Newton*, S. C. Colo., 1887; 14 Pac. Rep. 428.

132. PARTNERSHIP—Winding Up—Compensation.—— In the absence of an agreement a surviving partner is entitled to no compensation for winding up the partnership.—*Terrell v. Rowland*, Ky. Ct. App., June 16, 1887; 4 S. W. Rep. 825.

133. PLEADING — Amendment — Delay.——Not error to refuse an amendment to the answer after the plaintiff has introduced most of his testimony, when the defense proposed is a new and complete defense, but no explanation is made of the delay, the cause of action accruing about two years before, and no showing is made as to the truth of the defense.—*Kansas, etc. Co. v. Amick*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 454.

134. PLEADING—Amendment — Plaintiff's Name. —— The court can allow an amendment altering the christian name of the plaintiff in the petition, when it is shown that the first name was used by mistake.—*Weaver v. Young*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 458.

135. PLEADING—Departure.——Where an answer sets up a writing signed by plaintiff different from that alleged in the complaint, and plaintiff in reply admitted that he had signed that writing, but alleged that it had been fraudulently imposed upon him by the defendant as truly expressing their agreement: *Held*, that the reply was not a departure from the complaint, but only avoided the new matter.—*Rosby v. Paul*, S. C. Minn., June 30, 1887; 33 N. W. Rep. 698.

136. PLEADINGS—Limitation of Actions.——In Arkansas, the defense of the statute of limitations must be raised by answer.—*St. Louis, etc. R. Co. v. Brown*, S. C. Ark., June 18, 1887; 4 S. W. Rep. 781.

137. PLEADING— Limitation of Actions — Prescriptive Right.——A right of property founded upon the statute of limitations is a prescriptive right, and may be pleaded by a reference to the law which has the action without setting out the facts.—*Alhambra, etc. Co. v. Richardson*, S. C. Cal., June 27, 1887; 14 Pac. Rep. 379.

138. PLEADINGS—Demurrer—Limitations — Statute of. ——A demurrer that the petition is barred by the statute of limitations must be overruled, unless the petition shows such fact.—*Walker v. Fleming*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 470.

139. PLEADING—Misnomer—Justice. ——Upon a plea in abatement that there is a misnomer of the defendant, a justice of the peace may direct the process and pleadings to be amended by inserting the defendant's true name.—*Morse v. Burrows*, S. C. Minn., July 20, 1887; 33 N. W. Rep. 706.

140. PLEADING—Redundancy.——The court can strike out or allow to remain redundant matter in a petition. —*Smythe v. Parsons*, S. C. Kan., July 9, 1887; 14 Pac Rep. 444.

141. POOR LAWS—Settlement.——The New Jersey act, that one residing in a township for ten years shall be considered as legally settled there, makes such residence

an absolute settlement, and not *prima facie* merely.—*McLorinan v. Township of Bridgewater*, S. C. N. J., July 12, 1887; 10 Atl. Rep. 187.

142. PRACTICE—Continuance—Diligence.—— A party asking a continuance on account of absent evidence must set forth the facts, showing he has used due diligence, in his affidavit.—*Kilmer v. St. Louis, etc. R. Co.*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 165.

143. PRACTICE—Contract — Enforcing Judgment. —— Where A brings suit against B for money received by B for him as his attorney, A can have the judgment enforced under the statute, though B has given bond and though A's claim was reduced by a counterclaim for legal services.—*Bentley v. Brown*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 435.

144. PRACTICE — Depositions — Exceptions — Instructions.——Exceptions to depositions for incompetency and irrelevancy are properly heard during the trial. Special instructions desired must be reduced to writing and handed to the court.—*Tays v. Carr*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 456.

145. PRACTICE—Dismissal by Consent.——After a complaint is stricken out by consent the case should be dismissed.—*Smith v. Ling*, S. C. Cal., July 1, 1887; 14 Pac. Rep. 390.

146. PRACTICE — Instruction — Misleading.——An instruction not applicable to the evidence or containing an inference of fraud, which is wholly unsupported by the evidence, is misleading and erroneous.—*Ransom v. Getty*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 487.

147. PRACTICE—Trial—Verdict — Form.—— Where, in an action of trespass to try title the verdict was for certain defendants, the jury finding no transfers of a certain land certificate: *Held*, that it was a good general finding and also of the facts on which it was based.—*Shifflett v. Morelle*, S. C. Tex., May 31, 1887; 4 S. W. Rep. 843.

148. PRINCIPAL AND AGENT—Estoppel—Rescission.—— Where a principal has brought suit to recover purchase money of land sold by his agent, he is estopped by such suit, which is an affirmation of the acts of his agent, and he cannot maintain an action in equity to rescind the contract on the ground of the fraud of the agent.—*Merrill v. Wilson*, S. C. Mich., June 9, 1887; 33 N. W. Rep. 716.

149. PRINCIPAL AND AGENT—Sale—Commissions. —— Where a real estate agent advertises the land, calls the attention of a purchaser to it, directs him to the home of the owner, with a description of the property, and the owner then sells it at a less price than the agent was authorized to receive, the agent is entitled to his commissions on the amount received.—*Ratts v. Shepherd*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 496.

150. PRINCIPAL AND SURETY—Partners. —— A surety is one who is legally liable to pay a debt, and who, if he does so, is entitled to compel some other person to indemnify him, that other person being bound to have paid the debt before the surety. A partner, originally liable as principal, may become a surety in consequence of subsequent transactions with his partners.—*Wendlandt v. Sohre*, S. C. Minn., June 28, 1887; 33 N. W. Rep. 700.

151. PUBLIC LANDS—Bonds for Title — Patent. —— A bond for title to lands, to which a patent has not issued, conveys only an equitable title, to which the plea of stale demand will apply if suit is not instituted in proper time.—*Wilson v. Simpson*, S. C. Tex., May 20, 1887; 4 S. W. Rep. 839.

152. PUBLIC LANDS—Head-right Certificates.—— The act of 1873, granting a head-right certificate to one Lancaster, was unconstitutional, but was validated by the act of 1883, relative to head-rights, but those claiming under Lancaster must show that he came under the provisions of the last act.—*Blum v. Looney*, S. C. Tex., June 17, 1887; 4 S. W. Rep. 857.

153. PUBLIC LANDS—Indian Title.——The Kansas acting act, providing that one purchasing land from an Indian cannot be evicted by one having the legal title till the prior purchase money is repaid, is inoperative until the Indian title is extinguished.—*McGannon v. Straightledge*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 452.

154. PUBLIC LANDS—Suits by Attorney-general—Quieting Title—Possession—Void Deed—Patents.—— When the legislature subsequently recognizes the power of the attorney-general to bring a suit the proceedings therein are ratified. In an action of trespass to try title, it is not necessary to prove that either party was ever in possession. In such action a deed void on its face may be canceled. When the original location is contrary to law, both the location and a subsequently issued patent are void.—*Day Land, etc. Co. v. State*, S. C. Tex., June 21, 1887; 4 S. W. Rep. 865.

155. PUBLIC LANDS—Title—Evidence.——When it appears by a long series of conveyances and oral testimony that plaintiffs and those under whom they claimed had claimed title to certain marsh and beach lands, and performed acts of ownership and dominion on them, it was held that such evidence was competent to go to the jury on the question whether the State had ever parted with its title to such lands.—*Baum v. Currituck, etc. Club*, S. C. N. Car., May 27, 1887; 2 S. E. Rep. 673.

156. QUI TAM ACTION—Plaintiff—Civil Action—Imprisonment—Constitutional Law.——When a penal action is brought in the name of the State, it may be amended without new process to read commonwealth, and such action is properly brought in a court having jurisdiction of civil actions only. In a *qui tam* action to recover the penalty imposed the court will not consider the constitutionality of the act, wherein the court is granted an unlimited discretion as to the term of imprisonment for not paying the fine imposed, that part of the statute being severable from the rest.—*Com. v. Sherman*, Ky. Ct. App., June 4, 1887; 4 S. W. Rep. 790.

157. RAILROADS—Abutters.——In Iowa, the right of abutting proprietors to recover damages for occupation of streets by railroads is dependent wholly on statute. Construction of those statutes. A company can prove that the grantor of an abutting proprietor consented before plaintiff's purchase to the occupation of the street.—*Pratt v. Des Moines, etc. Co.*, S. C. Iowa., June 28, 1887; 33 N. W. Rep. 666.

158. RAILROADS—Animals.——If an animal is wrongfully upon the track of a railroad, even at a highway crossing, there is no duty on the railroad officers, to the owner of the animal, to keep a watch for such animals. Their duty only begins when the presence of the animal is discovered.—*Palmer v. Northern, etc. Co.*, S. C. Minn., July 20, 1887; 33 N. W. Rep. 707.

159. RAILROADS—Crossing Another Railroad. ——A railroad company has no absolute right to cross, with its track, that of another company. The matter must be settled by the proper court in pursuance of the statute.—*In re St. Paul, etc. Co.*, S. C. Minn., June 28, 1887; 33 N. W. Rep. 701.

160. RAILROADS—Constitutional Law— Crossings.—— Railroads may be constitutionally required to maintain highway crossings, although the requisition is subsequent to their charters which declare that they are not subject to alteration or repeal.—*Boston, etc. Co. v. County Commrs.*, S. J. C. Me., June 2, 1887; 10 Atl. Rep. 113.

161. RAILROADS—Eminent Domain — Highways — Evidence.——The fact that a highway exists upon land sought to be subjected to the use of a railroad by eminent domain proceedings may be shown by oral evidence. Ruling upon the principle on which damages should be awarded.—*Cedar Rapids, etc. R. Co. v. Raymond*, S. C. Minn., July 14, 1887; 33 N. W. Rep. 704.

162. RAILROAD—Eminent Domain — Powers of Court. ——When a railroad company has acquired a specific right of way, it can only be divested by legislative act. A probate court has no power to condemn for one railroad the road bed of another. Rules as to the condemnation of land, in Alabama, for railroad purposes.—*Armston, etc. Co. v. Jacksonville, etc. Co.*, S. C. Ala., July 27 1887; 2 South. Rep. 710.

163. RECEIVER—Appointment — Liquor License.—— Where the appointment of a receiver would destroy the

business, there must be the clearest evidence to obtain such appointment. A saloon's keeper's license is personal, and cannot be assigned nor committed to a court receiver.—*Semple v. Flynn*, N. J. Ct. Ch., June 30, 1887; 10 Atl. Rep. 177.

164. RECORDS—Abstracts of Title.——In Alabama, all records of the probate court are open to inspection and examination, but attorneys are not permitted to make abstracts of title to enable them to furnish such abstracts upon short notice.—*Randolph v. State ex rel.*, S. C. Ala., July 27, 1887; 2 South. Rep. 714.

165. RECORD—Certiorari—Evidence.——Upon *certiorari* the supreme court will review the record only; the evidence not being a part of the record will not be reviewed.—*In re Road in Bethlehem*, S. C. Penn., March 21, 1887; 10 Atl. Rep. 122.

166. REFERENCE—Report—Stipulation.——Where, by stipulation, the report of a referee is to be filed during a term, it is sufficient if it is filed, while the court is adjourned from day to day, when it subsequently is in session for that term. If it is objected that a judgment rendered by agreement on a referee's report in vacation is invalid, the court can determine it at the next term after it is filed.—*Davis v. Finney*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 460.

167. RIPARIAN RIGHTS — Tide-lands — Purchase.—— The law allowing littoral owners to purchase tide-lands from the State, does not apply to a sand-bar several miles from shore, exposed at low tide and covered with six feet of water at high tide.—*Elliott v. Stewart*, S. C. Oreg., Jan. 13, 1887; 14 Pac. Rep. 416.

168. RIPARIAN RIGHTS — Navigable Waters. ——The release of a water fount and booming privileges on a navigable stream, does not carry with it any right to the bed of the stream as may conflict with the public use of the stream. What are properly called navigable waters.—*Sullivan v. Spottswood*, S. C. Ala., July 27, 1887; 2 South. Rep. 716.

169. RELEASE—Disclaimer.——A disclaimer intended to operate as a release must be signed by the defendant himself and his signature attested by a person competent to be a witness.—*Dickinson v. Houston*, N. J. Ct. Ch., July 5, 1887; 10 Atl. Rep. 111.

170. RELEASE—Interest in Estate—Effect.——A release by a child for advances made to his father of all interest in his estate, is effectual, though a judgment is subsequently obtained against the releasor and his interest in his father's estate is sold thereunder, prior to a knowledge of such a release.—*De Witt v. Brando*, N. J. Ct. Ch., June 29, 1887; 10 Atl. Rep. 181.

171. REVIEW ON APPEAL — Adoption — Decree.—— Where the complaint is at the refusal of the court below to set aside a decree of adoption, as the act of assembly does not authorize an appeal, the supreme court will not review the evidence.—*Appeal of Lewis*, S. C. Penn., April 4, 1887; 10 Atl. Rep. 126.

172. SEDUCTION. ——In an action for seduction, it must be shown that the seducer accomplished his purpose by some false promise or artifice. Threats that he would abandon her company if she did not yield will not establish the charge.—*Baird v. Boehner*, S. C. Iowa, June 30, 1887; 33 N. W. Rep. 694.

173. SHERIFF—Duty.——A sheriff is to be held to the same care, diligence and vigilance as to property in his official charge as a prudent and careful man exercises over his own property.—*McKay v. Scott*, S. C. La., June 20, 1887; 2 South. Rep. 584.

174. SHERIFF—Powers—Process.——In Alabama, by statute, a sheriff is authorized to execute all mesne process. Under this statute a sheriff may execute process directed to a constable and issued by a mayor authorized by law to act as a justice of the peace.—*Bain v. Mitchell*, S. C. Ala., July 27, 1887; 2 South. Rep. 706.

175. SPECIFIC PERFORMANCE — Description. —— A vendor cannot resist a bill for specific performance of a contract of sale on the ground that there is no adequate description, if the bill describes the land by metes and bounds and otherwise and the answer admits that it is the land the defendant agreed to sell.—*Flaharty v. Blake*, N. J. Ct. Chan., July 2, 1887; 10 Atl. Rep. 158.

176. STATUTES—Appropriation.——An appropriation of money by the legislature, if there is no limitation by the terms of the statute, extends to the end of the first fiscal quarter after the close of the next regular session of the legislature.—*State ex rel. v. Babcock*, S. C. Neb., July 6, 1887; 33 N. W. Rep. 709.

177. STATE—Claims Against — Authentication.——All claims against the State of Nebraska, including those growing out of special appropriations, must be examined and approved by the auditor and secretary of State before any warrant can be issued for their payment.—*State ex rel. v. Babcock*, S. C. Neb., July 6, 1887; 33 N. W. Rep. 711.

178. STATUTE —Repeal—Municipal Corporation.——A particular law is not repealed by a general law unless they are so repugnant to each other that they cannot both stand. Power conferred upon a municipal corporation to suppress by ordinance the adulteration of drinks is not taken away by a later general law authorizing prosecutions for the offense in State courts.—*State v. Labatut*, S. C. La., May 9, 1887; 2 South. Rep. 550.

179. SURETIES — Contribution — Misconduct.——To a suit by a surety of a sheriff against his co-sureties for contribution, the fact that the breach in the bond was caused by the plaintiff while he was a deputy to the sheriff, is no defense, when the alleged misconduct was approved and ratified by the sheriff.—*Block v. Estes*, S. C. Mo., June 20, 1887; 4 S. W. Rep. 731.

180. TAXATION—Deed—Validity.——A tax deed which fails to recite the various steps necessary to give it validity is void.— *Duncan v. Gillette*, S. C. Kan., July 9, 1887; 14 Pac. Rep. 479.

181. TAXATION—Description—Judgment.——A tax list which describes the land as "lots" does not fulfill the requirements of the statute of Minnesota which requires that such lists should set forth the subdivisions of sections. A judgment founded on such a tax list is void.—*Kipp v. Fernhold*, S. C. Minn., June 15, 1887; 33 N. W. Rep. 697.

182. TAXATION—Lien for Taxes Paid—Limitation.—— The cause of action of a purchaser at a tax-sale, whose deed is declared invalid, to foreclose his lien for taxes, penalty, etc., begins to run from the time of such adjudication.—*St. Louis, etc. R. Co. v. Alexander*, S. C. Ark., June 4, 1887; 4 S. W. Rep. 753.

183. TAXATION—Tax Title—Covenant—Warranty.—— In Iowa, a tax deed is void if the taxes have not been carried into the proper lists for the right year. Taxes paid by a vendor of a void tax title cannot be set off against the vendee's claim for damages for breach of covenant of warranty, he having bought the outstanding title.—*Hooper v. Sac County Bank*, S. C. Iowa, June 29, 1887; 33 N. W. Rep. 681.

184. TAXATION—Tax Title—Unknown Defendants.—— In a proceeding having reference to tax titles under Iowa statutes, the petition by which such defendants are sought to be charged must be sworn to. Further construction of those statutes.—*Guise v. Early*, S. C. Iowa, June 29, 1887; 33 N. W. Rep. 683.

185. TENANTS IN COMMON—Adverse Title.——A tenant in common, who purchases an adverse title, holds as a trustee for his co-tenants.—*Clement v. Cates*, S. C. Ark., June 11, 1887; 4 S. W. Rep. 776.

186. TRIAL—Discretion—Promissory Note—Consideration.——It is not an abuse of the discretion of a trial judge when the defense to an action on a promissory note is a general denial, to refuse after the case has gone to the jury to permit a special defense to be made of want of consideration for the note.—*Derby v. Holman*, S. C. S. Car., July 4, 1887; 2 S. E. Rep. 841.

187. TRIAL—Framing Issues.——In Michigan, it is discretionary with the trial court whether it will order issues to be framed with reference to a claim against an estate which will present the questions wthether he

statute of limitations operate against such claim, and whether the decedent had sufficient capacity to make a contract.—*McGee v. Alkensen*, S. C. Mich., July 7, 1887; 33 N. W. Rep. 737.

188. TROVER—Contract.——When a person is authorized by contract to take and dispose of personal property, he cannot be held liable in tort, as in an action of trover, for any act done in reference to such property which is warranted by the terms of the contract.—*Stockler v. Wooten*, S. C. Ala., July 14, 1887; 2 South. Rep. 703.

189. TRUSTS—Parol Evidence.——A valid express trust of land may be created by parol, but can only be proved by written evidence.—*McVay v. McVay*, N. J. Ct. Ch., July 12, 1887; 10 Atl. Rep. 178.

190. TRUSTS—Resulting—Laches.——A suit to declare a resulting trust, brought thirteen years after the execution of the deed, no satisfactory excuse for the delay being given, will not be entertained, especially when the evidence is not clear.—*Clark v. Pratt*, S. C. Oreg., June 14, 1887; 14 Pac. Rep. 418.

191. TRUSTEE— Process — Attachment. —— It is not enough to show that the property in question was of a kind by statute that is exempt from attachment. It must be shown that it was in fact so exempt, or will be liable to trustee process.—*Rollins v. Allison*, S. C. Vt., Aug. 6, 1887; 10 Atl. Rep. 201.

192. USE AND OCCUPATION—Landlord and Tenant.—— Where a reservation is made in a sale of a building on the land sold, if the vendor leases such building to one who assigns his lease to the vendee, the vendor becomes as to such building the landlord of the vendee, and may maintain an action for use and occupation against the vendee as his tenant.—*Lockardo v. Rollins*, S. C. Penn., March 4, 1887; 10 Atl. Rep. 150.

193. VENDOR AND VENDEE—Bona Fide Purchaser — Equities.——Where A advances money to B on an agreement that B will purchase property to be sold under a deed of trust, and will include that property in a new deed of trust to be made to them, which is done, and B buys in the property under a sale, on the last deed of trust, he is not bound by any equities under the first deed of trust, of which he was ignorant.—*Fargason v. Edington*, S. C. Ark., June 4, 1887; 4 S. W. Rep. 763.

194. VERDICT—New Trial.——When the only question for the jury was the amount of the damages and the witnesses differed widely, it was not error for the trial judge to refuse to set aside a verdict founded on the evidence of plaintiff's witnesses. —*Western, etc. Co. v. Mathis*, S. C. Ga., Feb. 28, 1887; 2 S. E. Rep. 692.

195. WILL — Construction. ——A testator provided that if his son should have no other issue than one son then living, his power of desposition of the residuary estate should be limited to a certain sum, but if his son should leave other issue, then the son could dispose of one sixth of his residuary estate. The testator's son died without leaving other issue, and testator's grandson married and had issue: *Held*, that the contingency contemplated by the testator had occurred.—*Appeal of Barry*, S. C. Penn., April 11, 1887; 10 Atl. Rep. 126.

196. WILL—Construction—Devise.——Where a party leaves all his estate subject to the interest devised to his wife, to his son, but should he die without lawful children or grandchildren living at the time of his death, then to the wife, in such case the testator's grandchildren can never claim as devisees under the will.—*Parrish v. Parrish*, Ky. Ct. App., June 16, 1887; 4 S. W. Rep. 819.

197. WILL — Statute —Construction.——Construction of Connecticut statutes authorizing testators to devise after-acquired property. Operation of those statutes upon such devises.—*In re Dickerson*, S. C. Conn., March Term, 1887; 10 Atl. Rep. 194.

198. WILL — Vested Interest—Chancery Court.——A devise to a party absolutely to be distributed to him at the end of three years is a vested interest in fee. A court of chancery can construe a will, though the doubt arising is speculative.—*Williams v. Williams*, S. C. Cal., July 7, 1887; 14 Pac. Rep. 395.

199. WITNESS — Experts — Signature.—— Where the plaintiff having proved by witnesses the signature of a party to certain papers, whose signature on a promissory note is claimed not to be genuine, the defendant can examine his expert as to whether such signatures and that on the note were written by the same person, in his opinion.—*Smith v. Caswell*, S. C. Tex., March 26, 1887; 4 S. W. Rep. 848.

200. WITNESS—Privilege—Waiver.——Where a physician refuses to answer a material question on the ground of privilege, and his patient waives the privilege, he should be compelled to answer.—*Valensin v. Valensin*, S. C. Cal., July 9, 1887; 14 Pac. Rep. 397.

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERY NO. 9.

A and B own adjoining farms, B's being pasture land. A has a spring made by a stream of water on his farm, that runs under-ground through B's land. B digs a water-hole on his land to make a small pond for the purpose of watering his stock grazing in the pasture. The reason why he dug at that particular place was that he could hear a stream of water flowing through the earth under ground, though he did not necessarily know it was the same stream that, running under-ground through his farm, came to the surface in making A's spring. The hogs wallowing in this water-hole or pond on B's land foul the water and ruin A's spring, thereby showing the stream to be one and the same. 1. Has B any redress against A in an action at law or by injunction in equity? 2. Does the digging away of the earth's surface by B so as to bring the stream to the surface at his water-hole, though it flows on under ground from the water-hole to the spring, cause the law of running (or above ground) streams to apply, or is it the case governed solely by the law of under-ground water courses? 3. Would it make any difference in the case had B simply dug for water at random and struck it without having heard the under-ground water flowing at this particular place in its regularly defined channel before digging? The land is in Tennessee. Please cite authorities and answer at once.

Pulaski, Tenn. FLOURNOY RIVERS.

QUERIES ANSWERED.

QUERY NO. 1 [*25 Cent. L. J. 23.*]

A commenced an action in Minnesota by taking out a writ of attachment in a court of record against B, and made the proper affidavit and gave the statutory bond of $250.00, with C and D as sureties on the bond. B had the writ of attachment vacated and set aside on the ground that the affidavit was false. The condition of the bond is, "if said writ shall be vacated and set aside, then if A shall pay to B all costs which may be awarded him, and all damage which he may sustain by reason of the writ of attachment, then this bond shall be void, otherwise in force." The sheriff, on the 9th of February, 1887, attached $250.00 worth of personal property, and the writ was vacated on the 14th of the same month. The sheriff

refused to return the property after demand and after the writ was vacated. Now, B brought an action on the attachment bond against A, C and D., principal and sureties, to recover damages for converting the property, claiming the measure of damages was the value of the property, notwithstanding the sheriff failed to do his duty in not returning the property after the writ was vacated. The proof showed the above state of facts. The court directed a verdict for the defendants, A, C and D. Is, or is it not error?

J. H. L.

Answer. There is no breach of the bond, till B has recovered damages in the suit in which the attachment was issued, for the injuries he has sustained b y reason of the attachment. In case such damages are not paid, he can sue on the bond therefor. Crandall v. Rickley, 25 Minn. 119. As it was not alleged that B had recovered a judgment for damages in the attachment suit itself, the suit on the bond was properly dismissed. E. S.

QUERY NO. 2 [*25 Cent. L. J. 23.*]

If A sells B a piece of land, by virture of which B acquires a way of necessity over another piece of land belonging to A, in order to get to a highway, can A, before B has made any use of said way of necessity, or before there are any signs or indications of a way over said land, by selling the same to a party who has no knowledge of said way of necessity other than what he would be presumed to know from the general inspection of the premises and the highways near and about it, deprive B of his right of way? In other words, can the dominant estate be robbed of its way of necessity by a sale of the servient, to a purchaser who has no knowledge of the same except what the law would presume he had from observation and the general lay of the land and the unity of title of both pieces of land in the original grantor as shown by the records? C. M. M.

Crown Point, Ind.

Answer. "When land over which there is a right of way in another is sold, the purchaser takes it subject to the easement, though he had no actual notice of it." This was a case of a right of way of necessity. Wissler v. Hershey, 23 Pa. St. 333. See also Washb. on Eas. and Serv. (4th ed.), 7, 49, 51, 65, 258. B does not lose his right of way. M. K.

QUERY NO. 3 [*25 Cent. L. J. 48.*]

In 1852, G married B, daughter of N and wife. In 1867 N devised all his property to his wife. In January, 1868, N and his wife jointly made another will in which the former was revoked in so far as it vested the interest which B, wife of G, would have at their death, and they devise *that* interest to B's children instead of to B, and make the will irrevocable. This last *irrevocable* will was made in consideration that G would withdraw some charges he had made in a divorce suit pending between him and his wife. The irrevocable will was duly acknowledged as other conveyances of property usually are, and was delivered over to G, who, after having it recorded, has kept it in possession. Afterwards (in 1882) H, the wife of N, who survived him, made another will devising the whole of the property, disinheriting the children of B. What are B's children's rights. L. T. F.

Answer. The case stated implies that, the contract with G is so stated in the joint will, that the statute of frauds cannot be pleaded against its enforcement. In that case, B's children should file a bill in equity against the devisees under H's will to make them tendees for performing the contract with G for the benefit of B's children. Lord Walpole v. Lord Oxford, 3 Vesey, Jr., 402; *Ex parte* Day, 1 Bradf. Rep. 476. S. S. M.

QUERY NO. 5 [*25 Cent. L. J. 96.*]

Is an attorney's fee for securing and collecting funds belonging to an estate, a claim against the estate, or a personal claim against the administrators who employed the attorney? A. L. A.

Answer. The executor is personally liable in the first instance, but he will be allowed to charge reasonable fees therefor against the estate. 3 Williams on Ex. 1860, *n.* C.

RECENT PUBLICATIONS.

THE LAW OF TAXATION IN LOUISIANA. A Treatise on the Assessment and Collection of Taxes and Licenses, State, Parish, Municipal and Local. By E. D. Saunders, of the New Orleans Bar. New Orleans: F. F. Hansfil & Bro. 1887.

This is a local work which of necessity could be of little interest to the profession outside of the State to which it is applicable, or to those who might be interested in questions growing out of the law of that State. Within the country to which it does apply and to those who may be interested in the subjects of which it treats, the book will doubtless be of much interest and very useful. Taxation is provocative of much litigation which often involves interests of much greater magnitude than the mere assessment or tax levy which lies at the foundation of the action. Tax titles, sales of land for delinquent taxes and other like matters growing out of reluctance or inability to pay taxes furnish an abundant crop of lawsuits in almost every State, and as the subject is necessarily local, we think it would be well in every State for the profession to have at hand a manual similar to that before us, designed to present in one view all the State on the subject, carefully collated and annotated, and brought down to date.

JETSAM AND FLOTSAM.

THERE'LL BE REJOICING (?)—The following correspondence concerning a former fellow-citizen, whose name we kindly withhold, explains itself:

June 6.

CITY ATTORNEY—DEAR SIR;—Do you know the whereabouts of —— ——? Will you kindly make inquiry and learn if he is married at the present time?

Yours Truly,

R. N. ——

THE ANSWER.

June 24.

Yours of this month received. In answer will say the whereabouts of —— —— is one of the things several of our citizens would like to know, but can't find out. He is married (or was a short time since), and is yet if his cussedness has not separated them and resulted in a divorce. When he dies there will be rejoicing in heaven because he won't get there. He has a large chin, a bad memory, a guilty conscience and no credit. This is all we know of him—we wish we knew less. Hoping we may out-live our recollections of him, we close. Yours,

J. ——.